

# THE STATUS OF THE SUPERFUND CONTRACTING PROGRAM AND ITS RELATION TO SURETY BONDING ISSUES

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## HEARING

BEFORE THE

SUBCOMMITTEE ON

SUPERFUND, OCEAN, AND WATER PROTECTION

OF THE

COMMITTEE ON

ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

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SEPTEMBER 19, 1990

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Committee on Environment and Public Works



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## THE STATUS OF THE SUPERFUND CONTRACTING PROGRAM AND ITS RELATION TO SURETY BONDING ISSUES

WEDNESDAY, SEPTEMBER 19, 1990

U.S. SENATE  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,  
SUBCOMMITTEE ON SUPERFUND,  
OCEAN, AND WATER PROTECTION,  
*Washington, DC.*

The committee met, pursuant to notice, at 10:05 a.m. in room 406, Dirksen Senate Office Building, Hon. Frank R. Lautenberg (chairman of the subcommittee) presiding.

Present: Senators Lautenberg and Lieberman.

### OPENING STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Good morning. We will call the Subcommittee on Superfund, Ocean and Water Protection to order so that we can hold this hearing on the status of the Superfund Contracting Program and its relation to surety bonding issues.

Today we are going to look at the Superfund Contracting Program and whether the availability of surety bonding is affecting that program. I have heard reports that construction at Superfund sites is or will be facing problems and disruptions due to the problem of getting surety bonds. Apparently, for some types of construction bids the Government requires cleanup contractors to obtain such bonds. The companies who provide such bonding, in effect, guarantee the proper performance of a contract, as well as the contractor's payments to subcontractors.

But according to Superfund contractors, unavailability of bonding is resulting in few contractors being able to bid on certain contracts, and a recent EPA-commissioned report by the Corps of Engineers documents the concerns that many have raised about the effect that this can have on the Superfund Program.

Some have suggested that the result will be less competition and higher prices for cleanup construction work. Some believe that construction work in the long term will be slowed down. Some ask, can it go slower? Yes, it can.

The Corps report identified a number of options to address the problem. Some were administrative and some were legislative. But before we can solve a problem, we need to have a firm understanding of what the problem is. Today we hope to learn from our wit-



nesses what is going on. We hope to get their views on what needs to be done to address the situation.

To facilitate the effort, the staff has provided each of the witnesses with a list of questions which I hope to cover today. The members of the subcommittee have been provided a copy of these questions, and in the interest of saving time we might just direct the witnesses to respond to an already-submitted written question.

The goal is to get views from a cross-section of interested parties on the nature of the problem, as well as on some of the proposed solutions advanced by the Corps study and others.

With this focus in mind, I would like to call to the witness table Mr. Bruce Diamond, who is the Director of the Office of Waste Programs Enforcement, Office of Solid Waste and Emergency Response of the EPA.

Mr. Diamond, welcome. If you would, when seated, just introduce those who are accompanying you, and we will administer the oath because this is the oversight practice.

Mr. Diamond, who is with you there?

**TESTIMONY OF BRUCE DIAMOND, DIRECTOR, OFFICE OF WASTE PROGRAMS ENFORCEMENT, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVIRONMENTAL PROTECTION AGENCY, ACCOMPANIED BY KENNETH AYERS, CHIEF, DESIGN AND CONSTRUCTION MANAGEMENT BRANCH, OFFICE OF EMERGENCY AND REMEDIAL RESPONSE AND ANTHONY GUADAGNO, ATTORNEY, OFFICE OF GENERAL COUNSEL**

Mr. DIAMOND. Thank you, Senator.

Let me introduce, on my right, Mr. Kenneth Ayers, who is Chief of the Design and Construction Management Branch in the Office of Emergency and Remedial Response of EPA. Mr. Ayers is a member of the Public Health Service.

And on my left is Tony Guadagno, who is an attorney in EPA's Office of General Counsel.

Senator LAUTENBERG. I would ask each of you to raise your right hand and take the oath.

[Witnesses sworn.]

Senator LAUTENBERG. I thank you.

Before we start, Mr. Diamond, I believe that you've been given notice that we want to confine oral testimony to five minutes. I've had a chance to look at your written testimony; it doesn't take much longer than that, but the full written testimony will be included in the record. I therefore ask you to go ahead, with that admonition, and please present your testimony.

Mr. DIAMOND. Thank you. I am Bruce Diamond. As was said, I am Director of the Office of Waste Programs Enforcement in EPA. I am here because my office is the one which is charged with responsibility for implementation of Section 119 of CERCLA, which is the contractor indemnification provision.

I want to thank you for the opportunity to appear before the subcommittee on the issue of availability of surety bonds for response action contractors at Superfund sites. What I would like to do very briefly is take a few minutes to present EPA's general views on the possibility of amendment to Section 119 of CERCLA.

As Don Clay, who is the Assistant Administrator for the Office of Solid Waste and Emergency Response at EPA, stated in his August 16th, 1990 letter to you, the agency does not think that an amendment to the statute to protect sureties from potential liability is necessary. We are taking action that we believe will address some of the issues raised by the surety industry.

By way of background, the Miller Act generally requires all construction contracts issued by the Federal Government to have performance bonds for construction projects in the amount of over \$25,000 to protect the Government. Many components of the Superfund remedial program involve construction. However, services procured directly by the Federal Government for Superfund sites are subject to the Service Contract Act, and performance bonds are not required for this type of procurement.

As you know, EPA commissioned the U.S. Army Corps of Engineers to gather information on the availability of performance bonds for response action contractors. The results of that study were published in a document entitled "Hazardous and Toxic Waste Contracting Problems: A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program," and that was dated July, 1990.

In short, what the study found was that the surety industry is currently reluctant to provide performance bonds for Superfund work due to its perception of the potential liability associated with work at Superfund sites. This reluctance to provide performance bonds has significantly reduced the number of firms competing for Superfund work, although it has not stopped any work to date. It does appear that currently only large firms are able to secure performance bonds.

The surety industry is concerned that a surety, by providing a performance bond, may be exposed as a liability insurer to a Government agency, the owner, or third parties.

It is the agency's view that if the surety merely provides a bond that is not activated, the surety will not share any tort or CERCLA liability at a Superfund site. If the surety provides a performance bond that is activated because of the default of the response action contractor, the surety will have the same Section 119, CERCLA indemnification rights as the response action contractor. In other words, if the surety is called on to complete the cleanup, the agency believes that the surety "steps into the shoes" of the response action contractor for purposes of Section 119. The agency is currently working on the Congressionally-mandated guidelines for Section 119 and plans to clarify its views on the status of sureties in those guidelines and subsequent regulations.

There are also a number of steps we are considering to ensure that this situation does not inhibit Superfund's forward momentum. In addition, there are other options that the agency is pursuing to provide greater flexibility for the Federal Government in its procurement strategies for Superfund remedial actions. The agency is using service contracts, where appropriate, to procure services to perform remedial actions since performance bonds are not required under the Miller Act in those cases. Currently, the Federal Government is also taking steps to permit the use of letters of credit as an alternative to performance bonds.

I recognize that these comments are brief and I know they don't address all of the committee's questions. The agency will provide additional backup documentation as requested, including comments on the technical merits of any legislation that has been proposed, and further answers to the questions you posed.

Thank you for the opportunity to express the agency's views on this subject.

Senator LAUTENBERG. Thank you very much, Mr. Diamond.

In your testimony you say that in your view, an amendment to the statute is not necessary to protect the sureties from potential liability. But you do say later on, just to be sure that we're clear on this, that "this reluctance to provide performance bonds has significantly reduced the number of firms competing for Superfund work, although it has not stopped any work to date, it does appear that only large firms are able to secure performance bonds." So it's fairly obvious that you're saying that competition in the construction contracting work has slowed, and that presents some ominous signs, doesn't it, Mr. Diamond? The fact is that I hear from contractors about their concerns, and we're going to have testimony in a while from some contractors. Don't you think that's going to continue to decrease competition? And the result of that is obvious: that is fewer competent people, as well as higher prices.

Mr. DIAMOND. Well, I think it's clear, Senator, that we have to continue to watch this situation closely. The agency has obviously been concerned. That's why the Corps was asked to do the study that it did conduct. The results of that study, which are really the latest words on the subject, are that at the present time we don't find a serious problem so far as the program is concerned.

Senator LAUTENBERG. You're defining a problem as stoppage. Don't you see any difference in the response to requests for bids or RFPs generally?

Mr. DIAMOND. Well, there clearly has been a reluctance on the part of the surety industry to provide bonding, and that has had an impact on the ability of some contractors to compete. That is a matter of some concern. We haven't seen it reach a point that it causes serious problems for the program yet.

Senator LAUTENBERG. But the signs are there, and obviously when and if the problem does become serious, then it's going to be awfully late to take any action that would affect it, isn't it?

Mr. DIAMOND. Well, we're not waiting to take action. We are taking some steps right away. In fact, on September 14th there was published a proposal, the effect of which would allow EPA to accept letters of credit in lieu of performance bonds. We would expect that could go into effect as early as this spring. That could help alleviate the situation somewhat.

There are some other administrative actions that we can take and will take in the near future. We will further explore the appropriateness of service contracts as opposed to construction contracts, and where service contracts are appropriate, we will utilize that tool.

In addition, there are some other steps you can take. We can take large projects and break them into smaller projects, and in some cases that may alleviate the problem of getting bonding.

Senator LAUTENBERG. Does a letter of credit have the same character, as far as you are concerned, as a surety bond?

Mr. DIAMOND. Well, in appropriate circumstances it can protect the United States from financial consequences——

Senator LAUTENBERG. It can, but it doesn't have the same guarantees. Nor, isn't it fair to say, Mr. Diamond, can all contractors get letters of credit of sufficient size to do that job?

Mr. DIAMOND. It is likely that some contractors will not be able to utilize that alternative, that's correct.

Senator LAUTENBERG. Has surety availability always been a problem, or is that a fairly recent development?

Mr. DIAMOND. It seems to be—unless Mr. Ayres here has a different impression—but it seems to be an increasing tendency.

Senator LAUTENBERG. When did it become more obvious?

Mr. DIAMOND. To the best of my knowledge, within the last 18 months to two years it seems to have been harder for firms to secure surety bonds.

Senator LAUTENBERG. Mr. Diamond, can you give us an estimate as to how many cleanup contracts will require surety bonds over the next couple of years?

Mr. DIAMOND. For next year, our estimate is approximately 20. The year after that, we really don't have an estimate because that's subject to budget and other uncertainties that really make it impossible for us to give you a good estimate. I could make a guess, but it really would be nothing other than a guess.

Senator LAUTENBERG. Give us a guess.

Mr. DIAMOND. A guess would be, again, approximately 20.

Senator LAUTENBERG. Is there case law to support the current surety concerns over liability?

Mr. DIAMOND. No. I could ask counsel to elaborate on this, but our research to date does not indicate that there is any case law that supports that.

Senator LAUTENBERG. Mr. Guadagno, is there anything?

Mr. GUADAGNO. No, Senator, there is no case law that I'm aware of. But I would note that the case law seems to hold quite clearly two points, the first point being that as a general rule, the terms and conditions of surety bonds are strictly construed. In addition, the second point would be that apparently the courts have upheld disclaimers of tort liability in surety bonds.

Senator LAUTENBERG. Mr. Diamond, you said that perhaps you can solve the problem administratively. What steps might be taken administratively to deal with this?

Mr. DIAMOND. Well, the steps are the ones I have indicated previously. One of them would be to make the letter of credit option available——

Senator LAUTENBERG. Beside that.

Mr. DIAMOND [continuing]. For those who can do that. Breaking a project into smaller portions can take care of the problem. Utilizing service contracts where appropriate. And also, requiring less than 100 percent face value for the bond where the Government is adequately protected by less than 100 percent can also alleviate the problem.

Senator LAUTENBERG. When would you expect those administrative steps to be put into place?



Mr. DIAMOND. The letter of credit option requires that the proposal, which was just issued, go through a comment period, so that probably could not occur before the spring. I would think that the other options could occur quite rapidly.

Senator LAUTENBERG. To the degree that some of the administrative solutions won't require that bonds be issued, would that diminish the protection that the Government requires against default?

Mr. DIAMOND. Well, the letter of credit option will provide the Government with assurance so that if it suffers injury, then it will essentially be assured of contract completion or that it will be recompensed for the financial impact.

Senator LAUTENBERG. You saw the questions that we submitted. Recognizing that the schedule for this hearing was called rather quickly—and you mentioned that I wrote Don Clay about some of these ideas in July—can you fairly quickly give me your position on each of the specific legislative approaches identified in the written staff questions, number 8 through 12, including the idea of providing the Government with the discretion to set additional requirements in bonding?

Mr. DIAMOND. The best response that I can make to that, Senator, is that our view is that where the surety steps into the shoes of the response action contractor, that the surety will get the same indemnification protections as the response action contractor. What we will do is make that quite clear in the guidance we are about to issue under section 119 and then in the subsequent regulations that will be issued.

As I said in my written statement, if the surety is not acting as the response action contractor—in other words, has not had to perform under the bond—then we are just not clear as to what liability it is that they are concerned about, so that if they are subject to the type of liability that section 119 deals with, we think they are covered by section 119.

Senator LAUTENBERG. Mr. Diamond, because of time problems, we're going to move along. But I would ask you this: could you give me a detailed response in writing by the end of this week? Is that something that you can accommodate us with?

Mr. DIAMOND. We will give you the best response we can put together by the end of the week.

Senator LAUTENBERG. I'm sure it's going to be the best. I would also like it to be the quickest.

Mr. DIAMOND. Yes, sir.

Senator LAUTENBERG. Thank you.

[See responses to written question's p. 13.]

Senator LAUTENBERG. With that I call on my distinguished colleague from the State of Connecticut, Senator Lieberman.

Senator LIEBERMAN. Thank you, Mr. Chairman, and thank you for holding this hearing on an expedited basis and for your leadership in this Superfund area. Generally, the program is now at a critical stage with many of the studies completed, and hopefully the process of constructing and operating long-term remedies is now going to get underway at many of the sites.

I think we are focusing here today on a problem of real concern. I want to just quote the Army Corps of Engineers' report last July

which said that the surety industry concern about providing bonds for Superfund sites—

May well ultimately lead to a situation where bonding limitations will arbitrarily curtail the extent of competition realized by the Government for such work. This concern may threaten the Government's ability to successfully acquire the construction services needed.

That's a pretty serious statement and it's one that I think should justify our concerns.

Mr. Diamond, I want to pursue, in a little more detail, just one other aspect of the line of inquiry that has been going on.

You are one of the most experienced Superfund lawyers in the country. I think that goes without saying, but I am glad to have had the opportunity to say it for the record.

In your own legal opinion, is it possible that a court could hold a surety who steps in to complete a contract, liable as a generator of waste for any damages?

Mr. DIAMOND. I think it is possible, but that's why the indemnification provision exists. It was precisely that kind of possibility that the indemnification provision in Section 119 was designed to deal with. So in our view, if that eventuality were to occur, the protection of Section 119 would be available. Nothing needs to be done to make that available. It's available now.

Senator LIEBERMAN. So would you say, in that sense, that the surety industry does have some reason for concern on this question of strict liability?

Mr. DIAMOND. Well, the question of strict liability under Federal law, we think, is already dealt with by CERCLA through the indemnification provision. The question of strict liability under State law is not covered under section 119, but would not be covered by any of the proposals that we've seen put forward to date, either.

Senator LIEBERMAN. Let me ask you about one other part of this, and this another concern expressed by people in the industry. It has to do with the statute of limitations.

There is, as you probably know, concern that sureties could be liable a long way down the road if there was a leak in a ground-water cleanup system and drinking water wells were contaminated. There is a proposal that suggests, as an alternative, a one-year statute of limitations which would commence after the project is substantially complete. What do you think of that?

Mr. DIAMOND. Frankly, Senator, we are still contemplating that one in terms of the potential impacts. Obviously, it would affect EPA as well as third parties.

Senator LIEBERMAN. Agreed.

Mr. DIAMOND. So with your indulgence, I would like to make that one of the detailed responses to be submitted.

Senator LIEBERMAN. That's fine. Thank you.

[See responses to written question's p. 13.]

Thank you, Mr. Chairman.

Senator LAUTENBERG. Thanks very much, Senator Lieberman.

I would like to return for a moment, Mr. Diamond, to a question which I asked you earlier. If it is projected that 20 contractors will need surety bonds in 1991, and perhaps 20 in the following year, your administrative recommendation doesn't deal with the availability of bonds but rather says, okay, in some cases we're going to

be able to get letters of credit and break the jobs down to smaller parts and service contracts, etc.

Considering all that, as I understand your earlier comments, you are still left with 20 contracts that will need surety bonds. What do we do about those if we don't have companies willing to offer those?

Mr. DIAMOND. So far, there are—there is at least one company we know of right now that is still willing to offer them, and there are at least a few contractors who are able to meet those conditions. We think that the steps we're taking may make those contracts available to others, as well.

What I'm trying to say is that it's not a matter of no concern; indeed, it can be a matter of very serious concern, but we just don't see it rising to the level of problem now that would justify opening up the statute, in our view, in the agency's view.

Senator LAUTENBERG. We can disagree on our objective views of the situation, but if there is one company left that you can point to, I think it's a pretty precarious situation for us because if this company elects not to issue those bonds, then we are left with a situation where in fact there might not be the protection that we need.

Thank you very much.

Joe, anything else?

Senator LIEBERMAN. No, Mr. Chairman.

[A memo from the Committee addressed to witnesses and responses from EPA and the Corps of Engineers to written questions follow:]

MEMORANDUM

September 13, 1990

TO: Possible Witnesses in the Hearing of the Subcommittee  
on Superfund, Ocean and Water Protection of the  
Committee on Environment and Public Works

FROM: Seth Mones, Majority Staff (tele:202-224-8552)

SUBJECT: Procedures/Issues for September 19, 1990 Hearing.

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Procedures

The hearing will begin in Dirksen 406 at 10 a.m. As is the usual practice of the Subcommittee, testimony will be sworn. Although admittedly there is not much time, please try to submit by September 18, or at least bring with you, 50 copies of your written testimony. (Any testimony available on Sept. 18, should be delivered to me in Hart 408. Should you need to fax me anything, my fax number is 224-1273). Oral testimony will be limited to 5 minutes, but written testimony will be included in the record. Although written testimony is very much preferred, given the shortness of time, witnesses will be permitted to make 5 minute oral presentations, even if they have not completed their written testimony by the time of the hearing. (Late written testimony should, however, be completed no later than September 20, 1990 by 5 p.m.).

Questions

Below is a list of questions to guide the preparation of oral and written testimony. Obviously feel free to make additional points. While it is understood that some specific questions may fall outside a particular witness' area of expertise, please attempt to respond to as many of these questions as possible in both oral and written testimony. Given that there is a recent EPA commissioned Corps of Engineers study related to many of the issues (July 1990--Hazardous and Toxic Waste Contracting Problem--contact EPA or the Corps if you need a copy) raised below, all witnesses obviously are free to draw on the information in that report. But all Federal government witnesses (e.g. EPA and possibly the Corps, should the latter testify) are asked to be particularly attentive to that study in preparing their testimony:

1. Availability of Bonding. Is there a lack of availability of surety bonding for Superfund cleanup contracting work? How many sureties currently are issuing bonds for such work? (Please indicate the specific names of such sureties, if available, and describe the procedures such sureties are using in issuing such



bonds). If you think there is an unavailability of surety bonding, what do you believe is causing the unavailability?

2. Case Law. Are there any federal or state judicial cases where a surety has been held liable or sued specifically for Superfund liabilities associated with surety bonds issued to a Superfund cleanup contractor? Is there any related or analogous case law?

3. Data on Bonds Issued. Since the beginning of the Superfund program, for how many cleanup contracts have response action contractors obtained a surety bond of any kind? How many contracts to be let in the next two years will a surety bond be required?

4. Effects on Contracting. Is the availability of surety bonding causing any problems for Superfund cleanup contractors and the Superfund program generally? If so, please describe, with specific examples, if possible, what such problems are. Please indicate, if possible, how many contractors (indicate specific contractor companies, if possible) currently are able to bid for Superfund construction work given any applicable bonding requirements? Please also indicate what steps these contractors are being required to take to obtain such bonding.

5. Non-legislative Approaches. If you think the availability of surety bonding is causing problems, do you think such problems can be dealt with through administrative and regulatory actions? If so, please indicate specifically what administrative and regulatory actions would be necessary, as well as the soonest possible date such actions could occur? Is there any evidence that any such problem have been successfully addressed through administrative or regulatory approaches on a state level under those circumstances where state bonding requirements may have had some application?

6. Alternatives to Bonding. What alternatives exist to obtaining surety bonding for Superfund cleanup work? Do such alternatives provide the government with adequate protection? And are such alternatives readily available to a wide cross-section of the cleanup contracting community?

7. Legislative Approaches Generally. If you think the availability of surety bonding is causing problems, do you think such problems must be dealt with legislatively. If so, please indicate specifically what legislative changes would be necessary (note also that the following questions seek your views on some specific legislative proposals that some have made).

8. CERCLA Contractor Applications. Do you agree with the assertion that some have made that sureties should legislatively be provided with the same Superfund liability standard and indemnification opportunities as response action contractors? Please provide your rationale for your answer, including an assessment of how such a legislative proposal would compare to current law.

9. Miller Act Application. Do you agree with the assertion that some have made that if under applicable federal law surety bonds are required for any Superfund response action contract, that there should be a legislative requirement that would require such bonds to be issued in accordance with the Miller Act (40 U.S.C. sections 270a-f)? Please provide your rationale for your answer, including an assessment of what impacts such a legislative provision would have, and of how such a legislative proposal would compare to and affect current law and practice.

10. Rights of Action. Do you agree with the assertion that some have made that legislation should make clear that if under applicable federal law surety bonds are required, only an obligee on a performance bond should be afforded a right of action on the bond? If you agree with such a legislative approach, would you recommend that the legislation mandate this result flatly or would you recommend providing the government with the authority to provide otherwise in the bond if it so elects. Please provide your rationale for your answer, including an assessment of how such a legislative proposal would compare with current law.

11. Statute of Limitations. Do you agree with the assertion that some have made that legislation should establish that if federal law requires performance bonds for a response action, then the statute of limitations for bringing a suit on a performance bond should be one year from the earlier of the date of substantial completion of the contract or the date rights of the response action contractor to perform under the contract are terminated? (Please indicate whether you concur that the currently applicable statute of limitations under federal law is established by 28 U.S.C. sections 2415-16, and describe what period of time that statute would afford). If you agree with such a legislative approach, would you recommend that the legislation mandate this result flatly or would you recommend also providing the government with the authority to provide otherwise in the bond if it so elects? Please provide your rationale for your answer.

12. Bond Conditions. Do you agree with the assertion that some have made that legislation should establish that if federal law requires performance bonds for a response action contract, that such bonds are conditioned that response action contractors

perform the work in accordance with the plans and specifications of the contract, and that in the event of a default, the surety's liability on the bond will be only for the cost of completion of the contract work in accordance with the plans and specifications less the balance remaining to be paid under the contract, up to the penal sum (e.g. the value of the original contract) of the bond? If you agree with such a legislative approach, would you recommend that the legislation mandate this result flatly or would you recommend also providing the government the authority to provide otherwise in the bond, if it so elects. Please provide your rationale for your answer, including an assessment, if possible, on how this legislative proposal would compare with current law. Please also indicate what effect such a proposal would have on liabilities not arising under a bond, and how such effects could be clarified as part of such a legislative proposal.

13. Application of State-Federal Bonding Laws. Please elaborate on what conditions trigger the application of federal bonding requirements for Superfund contracting work, including an explanation of under what circumstances state laws would govern such work.

14. State Specific Assessment. (Question primarily for state witnesses, but other should feel free to comment on any points raised in this question--e.g. non-preemption point). How would each of the legislative approaches described in questions 8-12 compare to the laws or regulations of your state or any laws and regulations currently being considered in your state (for any related proposals under consideration, please provide details and status)? Given that the proposals in questions 8-12 only take effect if federal law requires bonds, and the proposal of question 8 would presumably be subject to the same non-preemptive conditions of CERCLA section 119, do you believe that such proposals would not be preemptive of state law? Would you recommend that any such proposals be accompanied, however, by a non-preemption provision. Please attempt to provide your specific state perspective on all the other questions (1-7 & 13) as well, specifically identifying the nature of any possible problems being experienced in your state.

15. General State Comparison. (For all witnesses able to comment). Please indicate how the legislative approaches raised in questions 8-12 generally compare to the laws, regulations, and practices of any states on which you have information.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

DEC 18 1990

OFFICE OF  
SOLID WASTE AND EMERGENCY RESPONSE

Honorable Frank R. Lautenberg  
Chairman  
Superfund, Ocean and  
Water Protection Subcommittee  
United States Senate  
Washington, D.C. 20510

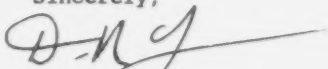
Dear Frank:

Thank you for your November 8th letter regarding the Agency's efforts to implement various recommendations for improving the performance of the Superfund program. I believe recent examinations of the Superfund program, including your report, Cleaning Up the Nation's Cleanup Program, and Administrator Reilly's Management Review have reinvigorated the program and provided the clear course of action necessary for the program's continued development. I look forward to providing you with an update on these recommendations and those of other interested parties within the next few weeks.

The purpose of this letter is to respond to Part C of your November 8th letter concerning questions you have raised regarding the effect of bonding requirements on the Superfund contracting process. Per your request, I am attaching EPA's response to questions posed during the subcommittee's September 19, 1990 hearing. It is my understanding that the Army Corps of Engineers will be forwarding their response to you shortly. If you require additional information on surety bonding issues, please contact Ben Hamm at (202) 474-9804.

Again, I look forward to discussing our progress in implementing program enhancements in Superfund both in the context of your recent request and in our future discussions.

Sincerely,

  
Don R. Clay  
Assistant Administrator

Attachment

U. S. Environmental Protection Agency  
Responses to Questions Posed by the Majority Staff  
of the U.S. Senate Environment and Public Works Subcommittee  
on Superfund, Ocean and Water Protection

Question 1: Availability of Bonding. Is there a lack of availability of surety bonding for Superfund cleanup contracting work? How many sureties currently are issuing bonds for such work? (Please indicate the specific names of such sureties, if available, and describe the procedures such sureties are using in issuing such bonds). If you think there is an unavailability of surety bonding, what do you believe is causing the unavailability?

Answer: Based on the U.S. Army Corps of Engineer's study and conversations with several surety firms and remedial action contractors (RACs), the availability of performance bonds to cover Superfund remedial action work appears to be limited. This may be decreasing the number of firms submitting bids for Superfund remedial action work and increasing the number of firms presenting individual sureties in lieu of corporate performance bonds for this work. Corporate performance bonds are the primary type of guarantee used in bonding Superfund remedial construction work.

To the best of our knowledge, only one surety, AIG, is currently providing performance bonds. This is in contrast to ten firms that provided bonds for remedial action projects during 1987-89. (See Charts 7 and 8, Corps of Engineers Study Report.) One basis for AIG providing these bonds appears to be requiring the potential contractor to provide a letter of credit for the face value of the contract to be covered by the bond. The letter of credit apparently requires substantial collateral.

We believe the limited availability of performance bonds is stemming from the sureties' perception of potential liability for their involvement in work at Superfund sites.

Question 2: Case Law. Are there any federal or state judicial cases where a surety has been held liable or sued specifically for Superfund liabilities associated with surety bonds issued to a Superfund cleanup contractor? Is there any related or analogous case law?



Answer: The Agency is not aware of any such cases and none has been brought to its attention.

Question 3: Data on Bonds Issued. Since the beginning of the Superfund program, for how many cleanup contracts have response action contractors obtained a surety bond of any kind? For how many contracts to be let in the next two years will a surety bond be required?

Answer: Fund-financed remedial actions may be contracted in three ways: through other federal agencies (e.g., U.S. Army Corps of Engineers or Bureau of Reclamation), through states, or as subcontracts to EPA architectural and engineering (A/E) prime contracts, such as Alternative Remedial Contracting Strategy (ARCS) and Remedial Engineering Management (REM) contracts. Under the Miller Act, performance and payment bonds are generally required for all construction contracts over \$25,000 awarded directly by federal agencies. Agency regulations generally require states to have their contractors secure performance and payment bonds for Superfund construction contracts awarded by them. However, the Miller Act does not apply to these bonds. If an Agency A/E prime contractor is used, the prime may require the construction subcontractor to provide bonds, but this is not a statutory or regulatory requirement.

Since the inception of Superfund, approximately 210 Fund-financed remedial action contracts have been awarded. Nearly all have been secured by performance bonds. Twenty-four specific examples are highlighted in the Corps of Engineers Bond Study Report. (See Table 2A.)

For FY 91, based upon EPA's Remedial Action Priority List, eight remedial actions, totaling \$224 million, will probably require performance bonds under the Miller Act. An additional twelve projects, totaling \$14.6 million, are scheduled for implementation under an EPA A/E prime (ARCS) contract. The prime contractor may require bonds of its construction subcontractors.

FY 91 Fund-financed remedial action projects to be implemented by federal agencies which may fall under the Miller Act are:

|                      |          |
|----------------------|----------|
| Lipari Landfill      | \$63.7 M |
| Glen Ridge/Montclair | 20 M     |
| Bayou Bonfuca        | 61 M     |

|                    |      |
|--------------------|------|
| New Bedford Harbor | 14 M |
| Greenwood Chemical | 12 M |
| Millcreek          | 12 M |
| Caldwell Trucking  | 30 M |
| Marathon Battery   | 75 M |

FY 91 Fund-financed projects to be implemented under a prime A/E contract where the prime contractor may require a performance bond (not Miller Act bonds) are:

|                       |         |
|-----------------------|---------|
| Amnicola Dump         | \$ .6 M |
| Berks Sand Pit        | 1.5 M   |
| Croyden TCE           | .5 M    |
| Hastings Groundwater  | 1.0 M   |
| Haviland Complex      | 1.3 M   |
| Lang Property         | 2.0 M   |
| Northwest Transformer | 1.0 M   |
| Purity Oil            | .5 M    |
| SMS Instruments       | .8 M    |
| Tristate Plating      | .4 M    |
| Mattice Petrochem     | 1.0 M   |
| American Thermostat   | 4.0 M   |

Projections for FY 92 are not currently available.

Question 4: Effects on Contracting. Is the availability of surety bonding causing any problems for Superfund cleanup contractors and the Superfund program generally? If so, please describe, with specific examples, if possible, what such problems are. Please indicate, if possible, how many contractors (indicate specific contractor companies, if possible) currently are able to bid for requirements? Please also indicate what steps these contractors are being required to take to obtain such bonding.

Answer: Discussions with industry representatives (EBASCO Services, Inc., Hazardous Waste Action Coalition, Environmental Business Association) have indicated that many potential Superfund remedial action contractors are being excluded from the market by the limited availability of performance bonds. This may have decreased the number of potential offers for a given contract. As competition decreases, costs associated with a given job normally increase. The observed increase in contract award amount versus the engineer's estimate for recent Superfund clean-up work demonstrates that this may now be occurring in the Superfund program. However, as also noted in one study, there may be other factors that impact the number of potential offers for any

given contract. (See data in U.S. Army Corps of Engineer's Bond Study.)

We are unable to determine at this time the actual number of potential remedial action contractors able to secure bonds; however, it appears that sureties are requiring substantial collateral to be posted prior to issuing bonds.

Question 5: Non-legislative Approaches. If you think the availability of surety bonding is causing problems, do you think such problems can be dealt with through administrative and regulatory actions? If so, please indicate specifically what administrative and regulatory actions would be necessary, as well as the soonest possible date such actions could occur? Is there any evidence that any such problems have been successfully addressed through administrative or regulatory approaches on a state level under those circumstances where state bonding requirements may have had some application?

Answer: The Agency believes that the lack of availability of performance bonds can be mitigated to some extent through administrative action. Although this does not address all surety industry concerns, it will allow the Superfund program to proceed with remedial action projects. These actions are:

- o The Agency hopes to use service contracts where consistent with the Service Contract Act. Contracts procured under the Service Contract Act are not subject to the bond requirements of the Miller Act. A service contract is proposed for the Baird and McGuire site in Massachusetts. Also, this was done at the state level at the Sikes Pit (Texas) site. The Agency is currently engaged in discussions with the Department of Labor on construction versus service designation for site remediation work.
- o The Miller Act permits the contracting agency to set the amount of the bond based on the risk to the federal government. The contracting agency will use this discretionary authority to lower the amount of the performance bond in appropriate cases. This was done at the state level for the Sikes Pit and LaSalle sites.
- o The Office of Federal Procurement Policy published in the Federal Register of September 14, 1990, a draft policy letter that would allow the use of irrevocable letters of credit

in lieu of surety bonds for Federal construction contracts in excess of \$25,000. This action was taken to improve access generally for contractors to Federal procurement opportunities and was not designed to specifically alleviate any Superfund problem. However, for EPA programs delivered at the state level, this approach of letters of credit was used at the Sikes Pit and La Salle sites.

- o It is the Agency's interpretation of CERCLA section 119 that if a surety provides a performance bond that is activated because of the default of the response action contractor, the surety will have the same section 119 indemnification as the response action contractor. The Agency has already orally notified surety industry representatives of this interpretation, and this interpretation will be included in the guidelines to section 119 that will be finalized soon. Also, the Agency is currently drafting a letter to the U.S. Army Corps of Engineers requesting that it develop language to be incorporated in its solicitations dealing with surety protection under section 119.

Question 6: Alternatives to Bonding. What alternatives exist to obtaining surety bonding for Superfund cleanup work? Do such alternatives provide the government with adequate protection? And are such alternatives readily available to a wide cross-section of the cleanup contracting community?

Answer: The use of performance bonds is generally required for construction contracts over \$25,000 under the Miller Act, and there is currently no alternative to this requirement. The contracting agency does have the authority to determine the appropriate level of bonding under the Miller Act, and, using risk analysis techniques and developing effective project management plans, the government may be able to reduce bonding levels on a case-by-case basis. In addition, as stated in the answer to question five, the federal government is taking steps to permit the use of letters of credit in lieu of performance bonds for construction contracts. This alternative would provide the government with adequate protection.

The availability of letters of credit to a wide cross-section of the cleanup contracting community

will be limited by issuers' requirements. Although entering service contracts is not an alternative to bonding, these contracts are not subject to bonding under the Miller Act. When service contracts are used, the government performs a more extensive responsibility (background) check of the contractor than when a performance bond is used. This approach works well for request-for-proposal (RFP) solicitations where contractor experience and stability are considered in the evaluation process.

Question 7: Legislative Approaches Generally. If you think the availability of surety bonding is causing problems, do you think such problems must be dealt with legislatively. If so, please indicate specifically what legislative changes would be necessary (note also that the following questions seek your views on some specific legislative proposals that some have made).

Answer: The Agency believes that an amendment to CERCLA section 119 is unnecessary at this time. If a performance bond is not activated, the Agency believes that the surety will not share any tort or CERCLA liability. If the bond is activated because of contractor default, the surety will have the same CERCLA section 119 indemnification as the response action contractor. The Agency will make this clear in the guidelines for section 119 that are expected to be published this winter.

Question 8: CERCLA Contractor Applications. Do you agree with the assertion that some have made that sureties should legislatively be provided with the same Superfund liability standard and indemnification opportunities as response action contractors? Please provide your rationale for your answer, including an assessment of how such a legislative proposal would compare to current law.

Answer: The Agency believes that an amendment to section 119 is unnecessary at this time. The Agency interprets the current law as providing sureties the same indemnification and protection from Superfund liability as the response action contractor when a performance bond is activated.

Question 9: Miller Act Application. Do you agree with the assertion that some have made that if under applicable federal law surety bonds are required for any Superfund response action contract, that there



should be a legislative requirement that would require such bonds to be issued in accordance with the Miller Act (40 U.S.C. sections 270a-f)? Please provide your rationale for your answer, including an assessment of what impacts such a legislative provision would have, and of how such a legislative proposal would compare to and affect current law and practice.

Answer:

No. The Agency believes that such a federal statutory requirement would preempt state bonding laws. Current Agency regulations generally require performance and payment bonds for Fund-financed construction projects administered by state, local and Indian tribal governments pursuant to CERCLA section 104(d). See 40 C.F.R. §§ 31.36(h) and 35.6590. However, bonds issued under these federal provisions are governed exclusively by state law.

Question 10:

Rights of Action. Do you agree with the assertion that some have made that legislation should make clear that if under applicable federal law surety bonds are required, only an obligee on a performance bond should be afforded a right of action on the bond? If you agree with such a legislative approach, would you recommend that the legislation mandate this result flatly or would you recommend providing the government with the authority to provide otherwise in the bond if it so elects. Please provide your rationale for your answer, including an assessment of how such a legislative proposal would compare with current law.

Answer:

The Agency does not believe such legislation is necessary; we believe that under current law only an obligee on a performance bond has a right of action.

Question 11:

Statute of Limitations. Do you agree with the assertion that some have made that legislation should establish that if federal law requires performance bonds for a response action, then the statute of limitations for bringing a suit on a performance bond should be one year from the earlier of the date of substantial completion of the contract or the date rights of the response action contractor to perform under the contract are terminated? (Please indicate whether you concur that the currently applicable statute of limitations under federal law is established by 28 U.S.C. section 2415-16, and describe what period of time that statute would afford). If you agree with such

a legislative approach, would you recommend that the legislation mandate this result flatly or would you recommend also providing the government with the authority to provide otherwise in the bond if it so elects? Please provide your rationale for your answer.

Answer: No. The Agency believes that all actions on Miller Act performance bonds should be governed by the applicable statute of limitations at 28 U.S.C. § 2415, which generally provides for a six-year limitations period.

Question 12: Bond Conditions. Do you agree with the assertion that some have made that legislation should establish that if federal law requires performance bonds for a response action contract, that such bonds are conditioned that response action contractors perform the work in accordance with the plans and specifications of the contract, and that in the event of a default, the surety's liability on the bond will be only for the cost of completion of the contract work in accordance with the plans and specifications less the balance remaining to be paid under the contract, up to the penal sum (e.g., the value of the original contract) of the bond? If you agree with such a legislative approach, would you recommend that the legislation mandate this result flatly or would you recommend also providing the government the authority to provide otherwise in the bond, if it so elects. Please provide your rationale for your answer, including an assessment, if possible, on how this legislative proposal would compare with current law. Please also indicate what effect such a proposal would have on liabilities not arising under a bond, and how such effects could be clarified as part of such a legislative proposal.

Answer: The Agency would not support language that might relieve the surety of its liability for the defective work of the contractor. The clauses "that response action contractors perform in accordance with the plans and specifications of the contract" and "the surety's liability on the bond will be only for the cost of completion of the contract work in accordance with the plans and specifications" may have this effect.

Question 13: Application of State-Federal Bonding Laws. Please elaborate on what conditions trigger the application of federal bonding requirements for Superfund contracting work, including an explanation of under

what circumstances state laws would govern such work.

Answer: The Miller Act generally requires performance and payment bonds for direct federal construction contracts over \$25,000. Moreover, Agency regulations generally require performance and payment bonds for construction contracts over \$100,000 for Fund-financed state-lead projects; however, those bonds are not subject to the Miller Act (see answer 9 above).

Question 14: State Specific Assessment. (Question primarily for state witnesses, but others should feel free to comment on any points raised in this question--e.g. non-preemption point). How would each of the legislative approaches described in questions 8-12 compare to the laws or regulations of your state or any laws and regulations currently being considered in your state (for any related proposals under consideration, please provide details and status)? Given that the proposals in questions 8-12 only take effect if federal law requires bonds, and the proposal of question 8 would presumably be subject to the same non-preemptive conditions of CERCLA section 119, do you believe that such proposals would not be preemptive of state law? Would you recommend that any such proposals be accompanied, however, by a non-preemption provision. Please attempt to provide your specific state perspective on all the other questions (1-7 & 13) as well, specifically identifying the nature of any possible problems being experienced in your state.

Answer: The Agency has no comments on this question.

Question 15: General State Comparison. (For all witnesses able to comment). Please indicate how the legislative approaches raised in questions 8-12 generally compare to the laws, regulations, and practices of any states on which you have information.

Answer: The Agency is unable to comment on this question.



OFFICE, CHIEF OF  
LEGISLATIVE LIAISON

DEPARTMENT OF THE ARMY

OFFICE OF THE SECRETARY OF THE ARMY  
WASHINGTON, DC 20310-1800

13 DEC 1990

Honorable Frank Lautenberg  
Chairman  
Subcommittee on Superfund, Ocean  
and Water Protection  
Committee on Environment and Public Works  
United States Senate  
Washington, D. C. 20510

Dear Mr. Chairman:

After the hearing on September 19, 1990, your staff posed a number of questions concerning the bonding of Superfund contractors. Enclosed for your consideration are the answers prepared by the Army Corps of Engineers. These answers have been coordinated with the Environmental Protection Agency and approved for submission by OMB.

Sincerely,

JOYCE E. PETERS  
Colonel, JA  
Legislative Counsel

Enclosure

## U. S. ARMY CORPS OF ENGINEERS

Responses to Questions Posed by the Majority Staff  
of the U.S. Senate Environment and Public Works Subcommittee  
on Superfund, Ocean and Water Protection

1. AVAILABILITY OF BONDING. Although contractors interested in competing for USACE EPA Superfund financed construction contracts have indicated that bond availability is a problem, USACE has not been required to forego award of contracts because of a lack of available bonding capacity. The same is true with respect to construction contracts awarded for remedial action funded by the Defense Environmental Restoration Account. The study contains information on the surety providers used on EPA financed construction contracts undertaken by USACE. The study was limited to consideration of EPA financed contracts only. Consideration of construction contracts awarded for DOD remedial action work is to be done in a future study.

2. CASE LAW. We know of no federal or state judicial case where a surety has been held liable or sued specifically for Superfund liabilities associated with surety bonds issued to a Superfund cleanup contractor. Discussions with surety and insurance interests revealed their concern over the potential that their involvement with a Superfund contractor might lead to their being made a party to a liability action in the future. Generally their concern has centered on the potential for third party damage suits being brought under state joint and several negligence standards. They also showed concern for possible liability under CERCLA. Although they have provided no specific court decision raising this concern, it is assumed that the origin of their concern is based on recent court decisions which expansively interpreted the obligations assumed by insurers and secured creditors with respect to contaminated cleanup sites. Surety interests do not in their words want to be the "deep pocket" of last resort in the event that a bonded contractor's actions result in a catastrophic loss.

3. DATA ON BONDS ISSUED. The USACE Study should be consulted for the number of bonds issued for EPA financed Superfund contracts. No workload projection is available for FY92. There is no basis on which USACE can estimate the number of potential USACE remedial action contracts which EPA may request USACE to undertake for FY92. Regardless of the number of these contracts that will come to USACE to administer, USACE intends to carefully assess the risk potential associated with each one that may require Miller Act bonds. Evaluation of contracts classified overall as construction indicates that in some instances a substantial quantity of the work to be performed under the contracts was of a service variety which held a lower risk potential for the Government. Recognizing this fact, USACE

intends in all future remedial action construction contracts to tailor the extent of performance bond requirements to cover only the level of risk involved. Moreover, when project work is characterized as being service as opposed to construction, bonding will generally not be required.

4. EFFECTS ON CONTRACTING. The contracting community has generally been adversely affected by the lack of readily available bonding. Indirectly, this has resulted in some difficulties being experienced by USACE. In some instances, contractors unable to obtain corporate surety bonds have sought out individual surety providers. This has placed an added burden on the contracting agency who must spend time and money on evaluating the adequacy of the assets put forward by the individual surety to cover the bond guaranty. Difficulties with these individual surety submittals and the need to delay awards while asset valuation is verified lead in some instances to substantial delays in the procurement process. Because of the rejection of many of these individual surety bonds based on insufficiency of the covering assets, a number of contractors who had provided low bids were eliminated from the competition for contract work.

Contractors report that the expense associated with using an individual surety bond is substantially greater than that entailed with a corporate surety bond. They also state that where the contract involves hazardous materials, many corporate sureties have withdrawn from providing any coverage.

5. NON-LEGISLATIVE APPROACHES. The USACE study provides a number of suggested actions short of legislation that should be explored to lessen the problems associated with the corporate surety's withdrawal from the marketplace for remedial action work.

There is indication that some contractors would be able to compete if the Miller Act requirement could be satisfied by other than a bond instrument. In fact, other instruments are permitted to be used but most of these require substantial cash outlays by the contractor and are therefore undesirable.

6. ALTERNATIVES TO BONDING. As mentioned in our response to question 5, other alternatives to corporate bonds do exist. The Federal Acquisition Regulation specifically provides for the use of cash, treasury securities and money orders. However, these are not effective alternatives in dealing with large remedial action contracts because of the financial burden placed on a contractor's capital. Contractors have offered to provide such security but with the stipulation that the percent of guaranty



coverage be lowered substantially from the normal 100% coverage applied to construction contracts. The individual surety bond market is also available.

One suggestion recently placed into consideration by the Office of Federal Procurement Policy (OFPP) is permitting the use of Irrevocable Letters of Credit. These would be required to be issued by a federally insured banking institution and could be drawn against by the Government or subcontractors in the event of a default or failure to make payment. Federal Notice publication took place on September 14, 1990. Comments are due by November 13, 1990. If approved for implementation, this could allow easier satisfaction of Miller Act guaranty requirements despite the corporate surety industries reluctance to participate.

7. LEGISLATIVE APPROACHES GENERALLY. USACE has been able to meet its requirement for bonds albeit recognizing that the corporate surety industry has consciously determined to limit the extent of participation in remedial action work. However, comment from contractors who previously were able to compete for work, regarding their inability to secure bond coverage poses concerns for future availability. The surety industry's concerns stem mainly from speculation on the direction which court decisions may take in the future. The USACE study provides a number of non-legislative actions that should be explored first to limit the bond for actions by non-obligees and to provide assurance that the surety can receive section 119 indemnification.

8. CERCLA CONTRACTOR APPLICATIONS. Generally, in the event of a contractor default on a construction contract, a surety can exercise one of two options. These include taking over responsibility for completing performance or paying costs incurred by the Government up to the penal sum of the bond as the result of the Government's completion of the defaulted work. Providing the surety with indemnification would serve to make its exercise of the former option more appealing. Since it would stand in the shoes of the defaulted contractor in terms of bearing all responsibility for control of the work, it seems that the surety would receive the indemnification coverage enjoyed by that same contractor. It is our understanding that EPA interprets CERCLA section 119 as providing for this result.

9. MILLER ACT APPLICATION. USACE deals only with Federal contracts for remedial action. With respect to these contracts, the provisions of the Miller Act cited are applicable.

10. RIGHTS OF ACTION. Since the Government's interests are paramount in our requirement for a Miller Act performance bond,

we see no basis for suggesting that any other party should have a right of action pursuant to the bond. We are aware of no precedent supporting a holding that the obligation under a performance bond reach others outside the Government obligee.

11. STATUTE OF LIMITATIONS. USACE sees no basis for deviating from the established statute of limitations for bringing suit by the United States on a bond instrument. It is presumed that 28 U.S.C. sections 2415-16 is the applicable federal law on statute of limitations for suits under bonds.

12. BOND CONDITIONS. USACE would object to conditioning the bond on the response action contractor's performance of the work in accordance with the plans and specifications. This would offer a surety the opportunity to walk away from any responsibility under the bond even where a default has occurred based on any showing that the contractor did not comply with some part of the plans or specification. The Government in such a case would have no recourse available against the surety for completion of the work or payment of excess completion costs. With respect to the draft legislation, USACE would urge deletion of all language from "...[s]uch performance bonds" in line 3 of (g) (3) to "...[s]pecifications of the contract" in line 6.

It is also suggested that the term "all contract provisions, plans and specifications" in the draft legislation be substituted for "the plans and specifications of the contract" found in sections (g) (3) and (g) (4). The surety bears responsibility for total compliance with all parts of the contract in the event of a default. There are no grounds for limiting its obligations to merely compliance with plans and specifications. Contract provisions governing the execution of contract performance must also be met.

Finally, regarding the draft legislation, the conference report should clearly state that the reference to 40 U.S.C. 270a-270d in no way should be interpreted as eliminating the exceptions provided the Government in 270e and f.

13. APPLICATION OF STATE-FEDERAL BONDING LAWS. USACE is aware of no instance where state law would govern issuance of performance bonds under its contracts for EPA remedial action work. On USACE contracts the requirement for bonding remedial action construction contracts is triggered by the Miller Act.

14. STATE SPECIFIC ASSESSMENT. No comment.

15. GENERAL STATE COMPARISON. No comment.

Senator LAUTENBERG. What we are going to do now—and I hope there was ample notice given as a courtesy to our witnesses—we're going to have to take a break for about half an hour, less if we can make it, and we would ask then that the panel composed of Mr. Christesen, Mr. Diederich, and Ms. Schubert, then be available. So at 11 o'clock we will reconvene, and I thank you very much.

[Recess.]

Senator LAUTENBERG. With apologies, I call the subcommittee back to order to continue the hearing. As you might suspect, there are other things of similar magnitude taking place here, including our presence in the Gulf and the meeting at—I'd like to say St. Andrews, but it's not at St. Andrews, it's at the Air Force Base. So again, with everybody's indulgence, we'll pick up where we left off.

I would ask the panel consisting of Mr. Christesen, Mr. Diederich, and Ms. Schubert to raise your right hands, all of you, please, and respond.

[Witnesses sworn.]

Senator LAUTENBERG. With that, there is a five-minute limit for oral presentations. We will take your full testimony in the record.

I would ask Mr. Christesen to give his testimony first.

**TESTIMONY OF RUSSELL J. CHRISTESEN, CHAIRMAN EMERITUS, EBASCO SERVICES, INC., ON BEHALF OF EBASCO SERVICES AND THE NATIONAL CONSTRUCTORS ASSOCIATION, ACCOMPANIED BY ROBERT BLACKWELL, WASHINGTON OFFICE, EBASCO SERVICES, INC.**

Mr. CHRISTESEN. Good morning, Mr. Chairman and members of the subcommittee. My name is Russell J. Christesen. I am Chairman Emeritus and former President and Chief Executive Officer of Ebasco Services, Incorporated, in New York, and Past Chairman of the National Constructors Association.

I appreciate this opportunity to appear before the subcommittee, representing both Ebasco and the National Constructors Association. I am accompanied by Robert Blackwell, an executive in our Washington office, who will assist me in responding to detailed surety or contractual questions.

With annual revenues in excess of \$1 billion, Ebasco provides engineering and construction services to private industry and Government agencies, including major environmental contracts with the Department of Defense and the Environmental Protection Agency. Our construction arm, Ebasco Constructors, headquartered in Lyndhurst, New Jersey, has been a leader in the cleanup of Government hazardous waste sites. Two of our recent projects are the award-winning Basin F cleanup, a \$36 million project at the Rocky Mountain Arsenal in Colorado, and the \$52 million BROS project in Logan Township, New Jersey.

Gentlemen, today Ebasco could not bid either Basin F or BROS or any other hazardous waste cleanup project due to the unavailability of surety bonding. Ebasco's nonavailability eliminates one of the three leading major remediation contractors from competition for Government cleanup contracts. At the same time, Ebasco has no problem in bonding other Government construction work.

The National Constructors Association represents the Nation's foremost engineer constructor firms engaged in the design and construction of major industrial, commercial, and process facilities worldwide. NCA members have the management capability, technical expertise, and available trained workforce necessary to undertake major environmental cleanup work. Currently, all of NCA's member companies—including Ebasco—are essentially shut out of major Superfund cleanup work by the unavailability of surety bonds.

This situation comes at a time when the EPA faces growing Congressional pressure to accelerate and improve the efficiency of Superfund site remediation. Limiting the pool of highly-qualified contractors working on Superfund sites will not only cause delays, but will adversely affect the cost and quality of cleanups. This will be especially evident on large, technically complex remediation sites, such as Basin F, where only highly qualified, well capitalized contractors, such as Ebasco, have the technical and management capabilities to perform effectively.

Sureties today are concerned with the imposition of liabilities far beyond traditional bond guarantees to complete performance and are refusing to bond even high-quality contractors. As far as I know, this includes all but two major remediation contractors, which I understand share one surety.

The 1990 U.S. Army Corps of Engineers study, which has been referred to, described the reluctance of sureties to provide bonds to construction contractors. It concludes that the general unavailability of bonding has reduced contractor competition and recommends a combination of administrative and legislative approaches to revitalize the corporate surety market.

The problem has also been recognized by the House Armed Services Committee. Its authorization bill states that it has become aware of growing evidence that the availability of surety bonds for Defense Department remediation projects is rapidly declining, and recognizes that a limited surety market will mean decreased competition, higher costs, and lower quality cleanup of DOD hazardous waste sites.

Along with potential delays, the absence of competition carries a direct financial cost to the Government. This potential was illustrated in the recent EPA Sikes Pitt procurement. The original procurement was withdrawn when only one of the two bidders was able to secure a bond, driving the initial bid to \$138 million, 53 percent over the agency's estimate. The reconfiguration of that procurement under a flexible State bonding law resulted in increased competition and a resultant cost savings to the Government of approximately \$40 million.

Our review of the surety situation indicates that the Government has limited administrative flexibility in this area due to the statutory language of the Federal Miller Act. Based on discussion with our surety, we believe that a piecemeal administrative solution will not be sufficient to trigger significant surety participation in the Federal cleanup program. To trigger such surety participation, we believe that a legislative remedy which specifically addresses the valid concerns of the surety industry must be immediately implemented.

Mr. Chairman, without immediate legislative action to provide bonding availability we are out of the public sector cleanup program at a time when a pool of highly qualified contractors and a well trained workforce are critical to meeting the needs of Federal agencies and essential to meeting the growing environmental concerns of our Nation.

Ebasco and the National Constructors Association offer their assistance to the committee and to the EPA in resolving the crucial problem of bonding availability.

Thank you very much.

Senator LAUTENBERG. Thank you very much, Mr. Christesen. I notice that included with your written testimony is a letter addressed to the Administrator, Mr. Reilly, dealing with this subject.

Mr. CHRISTESEN. Yes, sir.

Senator LAUTENBERG. I also note a letter to the Deputy Assistant Secretary of Defense for Environment. We appreciate your testimony and we will consider with great interest the comments that you have made.

Now we would like to hear from Mr. Diederich.

Mr. Diederich.

**TESTIMONY OF WARREN DIEDERICH, CHAIRMAN, INDUSTRIAL BUILDERS, INC., ON BEHALF OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ACCOMPANIED BY BRIAN DEERY, NATIONAL STAFF, ASSOCIATED GENERAL CONTRACTORS**

Mr. DIEDERICH. Thank you, Mr. Chairman. My name is Warren Diederich. I am a general construction contractor out of Fargo, North Dakota. My firm, Industrial Builders, Inc., has undertaken ground water protection work at hazardous waste sites for private owners. I am here today representing the Associated General Contractors of America, AGC. Its 102 chapters nationwide represent more than 32,500 firms, including 8,000 general contracting companies. With me is Brian Deery from AGC's national staff.

AGC is pleased to be given this opportunity to testify on the difficulties contractors are having in obtaining surety bonds to undertake hazardous waste cleanup work for the Federal Government, whether in the Superfund program or the Department of Defense's Environmental Restoration Program. The problem is very real, it is widespread, and it is significantly reducing competition for this work. Reduced competition will result in higher cleanup costs because it will diminish the available pool of qualified contractors able to do this work.

Without surety bonds, a contractor need not bother to submit a bid on a Federal construction project. This is also true of remedial action contracts for hazardous waste cleanup which are to be let by a Federal agency. Sureties can play an important role in ensuring that only qualified contractors perform hazardous waste cleanup work.

Surety firms are becoming increasingly concerned, however, about their exposure to third party tort liability claims because of the inadequacies of the insurance available to hazardous waste cleanup operators. Surety firms are concerned that their liability will be extended beyond that traditionally covered by performance



and payment bonds to tort claims as well. As a result, surety firms are currently very reluctant to provide bonds to contractors for hazardous waste work where there is no indemnification or other liability limit for the contractors and the surety firms. In some instances, surety firms have decided not to provide bonds for contractors for any work if the contractor has undertaken hazardous waste work.

Such action is a significant disincentive to undertaking remedial action contracts because, as I have pointed out, without surety bonding the construction contractor is locked out of the Federal construction market, and much State and local public work as well.

My firm has undertaken Federal construction projects and other public work in numerous States and never experienced difficulty in obtaining bonding for those projects. Several years ago my firm made the decision to pursue hazardous waste cleanup work. My firm made a major investment in two deep trenching machines which are used for remediation of contaminated ground water. We have been successful in obtaining numerous contracts with private firms to perform hazardous waste remediation work. However, despite our track record as a contractor and our experience with hazardous waste remediation, we have not been able to obtain any Federal contracts for hazardous waste work because we cannot get the necessary bonding.

My story is not unique. AGC has heard the same story from many contractors throughout the Nation. As you are no doubt aware, the Army Corps of Engineers, which acts as the contracting agency for the Environmental Protection Agency on certain Superfund projects, recently conducted a study on the bonding situation based upon the Corps' experience in awarding Superfund contracts. Perhaps the most telling fact contained in the study is that of the more than 400 construction firms which are on the Corps' Omaha District bidders list of firms who have expressed an interest in bidding on hazardous waste cleanup projects, only 24 have bid on this work and only 14 have been awarded remediation contracts. The study also shows that the number of bidders per remediation contract has declined over the past three years from 6.2 in 1987 to 4.6 in 1989.

AGC is aware of four contractors, three of whom are New Jersey contractors, who sought but were unable to obtain bonding to bid on remediation work at the Helen Kramer Landfill in New Jersey, which is a Superfund project awarded by the Corps of Engineers in September, 1989. It is significant to note that there were only four bids submitted on this project. The award amount was \$55.7 million, which was 55 percent higher than the Government's estimate for the cost of doing this project. If the four additional contractors had been able to obtain bonding, there would obviously have been twice as many bidders for the work. While there is no way of determining that any of these four excluded bidders would have submitted a lower bid price, the point is that the competition for this project was significantly less than it otherwise could have been.

With regard to possible solutions to this problem, AGC endorses several proposals made by the surety industry as follows:



The law should clarify that surety bonds are to be used as bid, performance, and payment guarantees only, and not as an insurance of last resort for third party tort liability claims;

Indemnification provided to the contractor under Section 119 of the Superfund Amendments and Reauthorization Act, or under any other authority, should be extended to the surety firm; and

Surety bonds should have a termination date certain following completion of the project.

In conclusion, AGC believes that the Federal Government's hazardous waste cleanup program will benefit significantly from increased involvement by the many qualified construction firms eager to get into this market. AGC believes that the increased involvement by these many qualified construction firms will significantly enhance competition for these projects, naturally leading to lower prices and greater innovation in cleanup procedures. This will only happen when surety bonds become more readily available to the many qualified construction firms interested in doing this work. AGC urges this subcommittee to consider closely the proposals of the surety industry and to act expeditiously to resolve this problem.

Thank you very much, Mr. Chairman.

Senator LAUTENBERG. Thank you very much, Mr. Diederich.

Now, Ms. Schubert, we ask you to give your testimony, and we would like you to know that there is a generosity of spirit in the chairman, and the red light doesn't mean that you have to stop immediately, but shortly thereafter. Thank you very much.

#### TESTIMONY OF LYNN M. SCHUBERT, SENIOR COUNSEL, AMERICAN INSURANCE ASSOCIATION

Ms. SCHUBERT. Thank you. I am here on behalf of the American Insurance Association, which is a trade association for major property casualty companies. We have offices in every State and over 230 members. AIA also does legislative and lobbying work on behalf of the Surety Association of America, which represents over 600 member companies who write surety bonds. Most of the largest writers of surety bonds are members of AIA, and almost all writers of surety bonds are members of SAA.

We are here today, and we appreciate your having this hearing, on what we consider to be a crisis that is quickly arising in the Superfund program.

There is one question that must be considered when considering the program and how hazardous waste cleanup projects are proceeding, and that is, who is going to guarantee that the money is available to clean up the site if the contractor defaults on his project? The federally prescribed method for doing that under the Miller Act, as you've already heard, is surety bonds.

Surety bonds guarantee two things: one, that the contract will be completed in accordance with the plans and specifications; and secondly, that the contractors and suppliers on the project will in fact be paid.

The problem that is arising is that very few contractors are able to obtain these required surety bonds for Superfund sites. This also

applies to hazardous waste sites on State projects, but I believe today we're going to attempt to address the Federal issue first.

The number of contractors is substantiated in the Corps study, which I guess every witness so far has referred to in their testimony. The Corps found that sureties, indeed, are reluctant to issue bonds for these types of projects. According to the Corps, and I'd like to quote from the study, this has "precluded some firms from being able to secure needed bonding, and has also lessened the opportunity for firms wishing to break into the Federal HTW marketplace."

I think we've heard from contractors who have experienced this problem themselves.

It is currently our understanding that, as the EPA stated, there is only one surety that is—I hesitate to use the word "aggressively," but at least is writing bonds for these projects on a fairly regular basis. That company is writing only for what we could consider the mega-contractors, contractors who have just incredible financial strength behind them.

There are other surety bonds that have been written in the past. Our understanding is that many of those were written before the home office had any idea that they involved hazardous waste or Superfund, and that may be the reason that many of those sureties have dried up, out of the market. Once they became aware of the situation, the local agents and regional bond managers no longer had authority to issue those kinds of bonds. If bonds are written by those companies, it's normally on an accommodation basis for the absolute largest customer they have, one bond at a time, in the hopes that they won't lose that contractor to some other surety.

The understanding that we have from the one surety that is issuing these bonds is that other than for their very largest customer, they are now requiring collateral to be posted to obtain surety bonds, which is a problem for almost every contractor.

The unavailability of these surety bonds is being caused by a number of different factors, one being the possibility that a surety is subject to strict liability as opposed to the negligence standard that its contractor receives. The EPA mentioned that if the surety performs on its bond, therefore it steps into the shoes of the response action contractor, and therefore takes on the negligence, standard, the indemnification, everything provided in 119.

What this fails to account for, however, is section 107 of CERCLA, which provides that anyone who arranges for the clean-up of the work is subject to strict liability. At the absolute least, we think that this is clearly a contradiction between the two statutes that needs to be resolved through statutory measures so that the courts cannot misconstrue that. We are concerned that if a surety takes measures to clean up the work, which it would have to do to perform under its performance bond, that it could be deemed to be arranging for the cleanup and strictly liable. I think this is something that must be addressed.

Secondly, the sureties are concerned that the projects as they are being bid in the recent past—and we believe there may be some changes to this—they currently include design. Now, there are design-build contracts in normal construction, and that's not a problem for sureties, but that's a bridge or that's a building. That's

not the state-of-the-art technology required by the Congress for hazardous waste cleanup sites. This is one area where we believe the EPA can address the problem through an administrative method. We have been working on them with language, perhaps even to redo their contract documents, to accomplish this.

The other problems are the possibility that the surety bond would be deemed to be a liability policy. We are very concerned that because there is no environmental pollution liability insurance for these construction projects, 30 years from now when the only person is available is the surety on the surety bond, that a court could misconstrue the bond. It is not unheard of by any means. It happens every day in the pollution liability arena right now, and surety bonds have certainly been misconstrued by courts in the past.

We also believe there needs to be a termination date for the bond. Under a normal construction project, you basically know that your claim for completion of the work is going to be received shortly after the program is completed. We are concerned with the way hazardous waste projects are being conducted, with the possibility of long-term damage, damage that we can't find out about until 10 years from now, that we are in a different situation than the normal construction contract. We think that a termination date on the bond would encourage EPA to be diligent in its investigations, and when it signs off on the project as being complete and accepted, that it will in fact be done properly.

Lastly, the indemnification must run to the surety. If there is indemnification appropriate for a contractor who completes the work, then it should also be appropriate for a surety who completes the work.

If I could just briefly address our basis for not believing that non-legislative solutions are adequate, there are just a few points I would like to make.

One is that you have to be concerned about what a court does in construing regulations versus legislation. It's just a matter of law that legislation overrules regulations. While the EPA is comfortable with putting in their indemnification guidelines that the indemnification runs to the surety and the surety steps in the shoes of the RAC, if section 119 itself doesn't authorize that, the regulations will not bear any weight, in our opinion. We don't believe that the current definition of a RAC covers the surety, and the regulations cannot change that.

Also, a letter of credit causes a number of problems, both for a contractor and for the Government that is receiving the letter of credit as a guarantee. First, to obtain a letter of credit you must be financially sound to the point that you can put up collateral to the bank. That, then, affects the working capital of the contractor and is a major problem for them in continuing to bid other projects.

As for the guarantee to the Government, what a letter of credit does is, if the contractor defaults, you can then make claim on the letter of credit for the cost, the amount of the letter of credit, which presumably is the contract price or whatever the surety bond would have covered. What it does not do is cover subcontractors and suppliers, so what you have are laborers who are not covered under the one letter of credit.

Now, if there is sufficient money in the letter of credit to pay for both the completion of work and to pay unpaid suppliers, then perhaps that will take place. It is not a guarantee by any means. Also, there is no claims servicing that is provided with a letter of credit. The Government would have to be the one to entertain all the claims of the contractors, and a letter of credit does not provide the same degree of prequalification that a surety bond does.

I would also just briefly say that as far as defining these contracts as service contracts, if you define it as a service contract the laborers are paid at a different wage scale under Davis-Bacon, so you must be very careful that all construction contracts are deemed to be construction contracts.

Thank you.

Senator LAUTENBERG. Thanks very much. This is one of the few times that I've heard that the legislative language is clearer than other writings. It's nice to get that reassurance. [Laughter.]

Let me ask any of you who would like to volunteer an answer, when did the surety availability problem first erupt or become apparent to everybody?

Mr. CHRISTESEN. Mr. Chairman, in our own situation we became aware that there was a problem beginning to surface maybe a year or so ago when we ourselves were running into difficulty in securing bonding. But this problem has developed a lot more rapidly than we anticipated even at that time, reaching its crisis condition today.

Senator LAUTENBERG. Mr. Christesen, you said that your company—you used a billion-dollar figure there. Refresh my memory. Was that revenues?

Mr. CHRISTESEN. That's revenues, yes.

Senator LAUTENBERG. Revenues.

Is anybody from the Association aware of how many companies there are that are of that size or larger in revenues within—Mr. Diederich, let's say your association?

Mr. DIEDERICH. I don't believe there are any companies in our association at this time that are bidding hazardous waste that are of this magnitude.

Senator LAUTENBERG. Are you a member of that association, Mr. Christesen?

Mr. CHRISTESEN. Yes—excuse me, not of AGC. No, sir.

Senator LAUTENBERG. Okay. But your organization is involved with an industry association?

Mr. CHRISTESEN. Yes.

Senator LAUTENBERG. Do you know how you rank in size within your association?

Mr. CHRISTESEN. Well, we're probably in the top 10 or so of companies in the business that we're in.

Senator LAUTENBERG. I ask you that because of the difficulty—you're a pretty good-sized company—is there a pretty good net worth associated with Ebasco?

Mr. CHRISTESEN. Yes, sir.

Senator LAUTENBERG. Do you have any idea what that is?

Mr. CHRISTESEN. No, I couldn't give you that.



Senator LAUTENBERG. Ms. Schubert, are you aware of any case where a surety has been held liable, or even sued for liability, in connection with a Superfund bond?

Ms. SCHUBERT. No, I'm not. We tried to check around on that. It's difficult to find sureties that have issued many of these bonds, so there's not much history on that on the Superfund sites, so we don't have any specific cases where they have been sued for that. Of course, I'm sure that some of that has to do with the fact that the cleanup of the sites themselves has not been taking place for that long. A lot of the Superfund work prior to the last few years was design and those kinds of contracts. We have to get to the completion and have somebody default. We haven't had that yet, but we have a couple of situations that we think are very analogous. One is, as I mentioned, just the standard pollution liability problem that is existing right now. Insurance policies in the past had what is called a "pollution exclusion." That exclusion had an exemption from it for sudden and accidental injury, so pollution that occurred due to a sudden and accidental occurrence was covered under the policy.

As I am sure you are aware, the courts have construed that many times over to mean that "sudden and accidental" does cover damage that occurs over 30 years or more, that as long as it is unexpected, it is sudden. We are concerned that those same kinds of things would happen under a surety bond. There are cases where a surety has been held liable for tort liability, and that is something that we're very concerned about on these projects, mainly because there will not be any other insurance available.

We have some cases which are cited in our written testimony in the footnotes, as well as we've had a situation in New Jersey specifically where we discussed this issue with former Governor Kean about whether tort liability was recoverable against a surety or not, and we had some interesting discussions about what was a contract claim and what was a tort claim. There is now a statute in New Jersey, as I'm sure you are aware, that says that a surety bond does not cover third party tort liability claims. But we're very concerned about that issue, and we think there is enough case law out there to make our concerns reasonable.

Senator LAUTENBERG. Mr. Diederich, in your testimony—and I found all of the testimony very interesting—you talked about the small number of bidders on the contract that was let out of the Omaha District. I just wonder whether the fact that there were fewer bidders per remediation contract in 1989 than there were in 1987—what about the experience factor in there? What about the contractors inability, if there is any, to hire the kinds of skilled people necessary to do these jobs? As we just heard, the remediation process has gotten into full swing only in the last three or four years. Is there anything that would prevent contractors from bidding these jobs because they just don't have either the financial wherewithal or the skills base available to do it thoroughly?

Mr. DIEDERICH. I'm sure this would enter into it. However, let me use my own case.

I am capable. I have capable people working for me——

Senator LAUTENBERG. How big is your company?

Mr. DIEDERICH. We do about \$30 million a year.

We have people in-house that do the private sector work. The work that I'm referring to and the particular contracts that we're looking at would have used this private sector expertise in the Government. In this particular case it was on a river, and it was on an air base, to clean up the contaminants that were there. We were unable to bid, so I can just use my own past history on this.

I do know other contractors in the AGC—where we have a committee, which works on this very diligently—who have also been unable, and I would say that they do have the expertise to go in and to do the work, and the money also.

Senator LAUTENBERG. Ms. Schubert, assuming some versions of the proposals that you suggest were enacted, what's your concept or rationale for limiting the current statute of limitations for suits by the Federal Government?

Ms. SCHUBERT. Our concern is basically on certainty, the certainty of the termination. So whether it is, say, one year or two years or three years is not quite as much a concern of the industry as is the fact that they will be able to know that the time will, in fact, terminate. There is quite a bit of rationale and precedent for this.

One of our problems is—

Senator LAUTENBERG. Such as?

Ms. SCHUBERT. Well, precedent, we have precedent which we think is very persuasive in the Surface Mining Reclamation Act, which was amended this year to provide a specific termination time for surety bonds issued for surface mining sites which are being reclaimed. It runs from, I believe, one year from the date that the grass is last seeded or augmented or something technical like that. It's in our written testimony, the specific statutory language.

We think that we're similar to that in the sense that we're also going to be involved in guaranteeing work that is being done in the ground, mainly, a lot of dredging, in addition to the other activities. In our situation you're involved with hazardous waste materials that may take quite a bit of time to appear as a problem in the aquifer or wherever it arises.

We do not say that we should not guarantee that the project will be completed and properly completed. But what we're concerned about is that if there is a problem, the claim won't be made until 20 years from now. We're hoping that a diligent effort will be made to examine the work and be sure that it is proper so that we can then pay or complete the work while it is still timely, and then move on to another project and bond another contractor.

There is an example, the Maryland State Little Miller Act, which is the public works statute requiring surety bonds for Maryland public works. It does have a statute of limitations for performance bonds of, I believe, two years, and CERCLA itself has a three-year limitation in it for claims by the Government for natural resource damages. So it is not something that couldn't be done or hasn't been done in the past.

Senator LAUTENBERG. Right. But when you're looking at the Maryland "Little Miller," as you define it, that's construction projects?

Ms. SCHUBERT. That's right. That covers all construction projects.



Senator LAUTENBERG. It's a lot easier, I think, to define completion or quality in that situation than it is in the Superfund remedial action, which needs some time to permit it to either not ferment or ferment, as the case may be, and see whether—to use the term used in some types of surgery—it has all been removed. You don't know that.

Ms. SCHUBERT. Excuse me, but I think you have to keep in mind what the performance bond is going to guarantee—

Senator LAUTENBERG. Of course.

Ms. SCHUBERT [continuing]. And that is that it's completed in accordance with the contract documents, the plans and specs.

Senator LAUTENBERG. Right.

Ms. SCHUBERT. And if that is done, then we have performed what we have guaranteed. We have not guaranteed that the design will be effective.

Senator LAUTENBERG. Right. There is some confusion, at least, that has to be considered in terms of what constitutes what the bonding mechanism is designed to do.

I appreciate hearing from all of you, and would ask that if there are questions submitted to you, you respond promptly in writing so that we can make sure that our hearing record is complete.

Thank you very much.

With that, I call Mr. Early and Mr. Mallino.

Mr. Early is the Washington Director of the Pollution and Toxics Program of the Sierra Club, and Mr. Mallino is the Director of Government Affairs for Connerton, Ray & Simon, on behalf of Laborers International Union of North America and the National Health and Safety Trust Fund of the AFL-CIO.

Both of you are familiar faces to me, and me to you. Despite the fact that there is full trust and belief in your credibility, we're going to ask you to take the oath, as everyone else did.

[Witnesses sworn.]

Senator LAUTENBERG. Thank you very much.

Mr. Early, if you would, carrying our generous admonition about time. You have five minutes, plus or minus a couple of minutes.

#### TESTIMONY OF A. BLAKEMAN EARLY, WASHINGTON DIRECTOR, POLLUTION AND TOXICS PROGRAM, THE SIERRA CLUB

Mr. EARLY. Thank you, Mr. Chairman. I'll just summarize my testimony.

I appreciate the opportunity to testify before the subcommittee.

I think we all agree that the Superfund program is moving much too slowly, and I think the Sierra Club's position in general is that while there are many problems, most of those problems are solvable administratively. We believe that any legislation that is put forward at this time must be, A, noncontroversial, and B, make very modest changes to the underlying law.

I emphasize that in the context of this discussion because if, in attempts to deal with this problem which I believe is a problem, other Members of Congress begin to offer amendments that do major changes to the act, we believe we should terminate any effort to fix this problem. It is very important that the Superfund law remain stable as it is. Let's let the program work. Legislative

modifications at this time of any controversial nature, we would vigorously oppose.

The subject of this hearing does provide an example of a problem which we believe could be addressed legislatively, and should be addressed legislatively. Lack of available surety bonds to guarantee cleanup contractor performance is a real problem, we believe. Performance bonds provide a valuable function in the Superfund cleanup program. They are designed to ensure that both the cleanup contract is completed, and more importantly, or at least as importantly, that it is completed properly, that the terms and conditions of the contract and the specifications are in fact met. I will elaborate on that in a minute.

If insurance companies continue to refrain from writing surety bonds for cleanup contractors, we believe that the inevitable result will be fewer contractors in the program and a slowdown in the program, and also an increase in the expense of the program. Both of these eventualities would be very unfortunate.

The Sierra Club supports three changes to section 119 of CERCLA which would make it more attractive for members of the insurance industry to issue surety bonds to guarantee cleanup contract performance.

The first is that the industry asserts that section 119 is not clear that a surety which takes an action pursuant to the requirements of a bond has the same liability as the response action contractor would have. Since the surety is essentially taking the place of the response action contractor, we see no reason not to clarify the law in that respect.

I want to emphasize that when we're talking about clarifying their liability, we're talking about Federal liability, not State liability. As you know, the Sierra Club has long opposed Federal legislation preempting State liability requirements.

Second, the industry asserts that it needs to limit the liability of a surety to the amount of the contract, less any amount which EPA has not paid on the cleanup contract. While such a limitation makes sense in the context of completing the contract, I want to raise one issue that is of concern.

It is conceivable that if a contractor were essentially to botch the contract—that is, improperly perform the contract, rather than not complete the contract—the cost of fixing that problem could exceed the original contract amount. Now, if the industry is taking the position that they just don't want to buy into a situation where, in order to rectify a botched performance, they may be subjected to an unknowable or unlimited liability amount, we think that this can be clarified. But I emphasize that EPA should have the ability to deal with this kind of situation. The law should not restrain their ability to cover this problem of poor performance or improperly performed contract work, if they feel that that's appropriate.

The industry also is concerned that the law does not clearly provide that only EPA can sue to invoke the provisions of the surety bond against the surety, and are concerned about the possibility of third parties essentially trying to use these provisions to bring a tort action. We would support a limitation of rights of action, but again, we believe that EPA should be allowed to provide for a right of action to others in the bond as appropriate. As you well know,

once a Superfund cleanup is completed, the State bears the responsibility for monitoring and maintaining that site. If a problem were to arise as a result of improper contractor performance, the State should, in my view, have the ability to invoke the surety bond to rectify that situation. Again, I think that that should be an option that is available to EPA, but in a general concept we support limiting the right of action to a very small number of parties of that type.

Finally, there is an issue which the industry raises which we cannot support, and that is the statute of limitations. The industry takes the position that the statute of limitations for bringing a suit on a performance bond should begin to run one year from the earlier of the date of substantial completion of the contract, or the date rights of the contractor to perform under the contract are terminated. We would oppose this proposal.

Normally, a statute of limitations for a performance bond on a construction project would begin to run from the date a breach of performance is discovered, or reasonably should have been discovered. We see no reason why these bonds shouldn't operate in the same fashion.

From a public policy point of view, it is important that a maximum amount of incentive be given to the contractor to perform the contract to its completion and to perform it properly.

By providing a statute of limitation only running from the completion of the project, you may have problems of performance which arise after that period which aren't discovered, and therefore there is reduced ability to invoke the surety and get that problem fixed.

If you run the statute from the date of discovery, both the contractor and the surety have an increased incentive to make sure that the job is done right. The proposal by the insurance industry would provide only a very small window of potential liability for improper performance, and which would therefore lessen that incentive.

While Superfund cleanups may be characterized as involving exotic and experimental construction techniques, in fact all too often we are talking about traditional construction activities that are aimed at just containing the waste. We don't see this as such a unique situation that we need to have a special statute of limitations along the lines that the industry is advocating.

We look forward to working with the subcommittee on this matter. As I mentioned before, and I want to reiterate, we hope that we can deal with this problem while not creating a vehicle by which other problems are sought to be addressed in the Superfund program. The Sierra Club would oppose that effort.

Thank you, Senator.

Senator LAUTENBERG. Thanks very much, Mr. Early.

Mr. Mallino, if you would?

**TESTIMONY OF DAVID L. MALLINO, DIRECTOR OF GOVERNMENT AFFAIRS, CONNERTON, RAY & SIMON, ON BEHALF OF LABORERS INTERNATIONAL UNION OF NORTH AMERICA AND THE NATIONAL HEALTH AND SAFETY TRUST FUND, AFL-CIO**

Mr. MALLINO. Mr. Chairman, my name is David Mallino, and I am the Director of Government Affairs for the law firm of Conner-ton, Ray & Simon. I am here today representing the Laborers International Union and its National Health and Safety Trust Fund, which is a joint labor-management cooperative effort between the union and a number of its contractors.

This morning, Mr. Chairman, I was informed that the International Union of Operating Engineers have reviewed my testimony, concur with it, and would like to be associated with the remarks that are made here.

Senator LAUTENBERG. That's the——

Mr. MALLINO. International Union of Operating Engineers.

The Laborers and the Operating Engineers are two of the principal unions whose members are engaged in hazardous waste clean-up and remediation under Superfund. As you know, Mr. Chairman, we were actively involved in the legislative effort to reauthorize Superfund, and our legislative activities have continued, particularly with respect to the health and safety protection and training of workers engaged in Superfund-related activities.

Our position at the time of Superfund reauthorization was, and continues to be, that cleanup activities must proceed as quickly and as efficiently as possible with all due regard for the safety and health of the workers, the surrounding communities, and the environment.

Given the highly dangerous nature of this work, we believe that only those response action contractors that meet the highest possible standards of performance should be allowed to engage in clean-up and remediation activities. Moreover, the work force itself should be limited only to those workers who have been properly and adequately trained under the requirements of section 126 of SARA.

Based upon our on-site work experience over the last several years, we have concluded that these criteria are largely being unmet or ignored. In some cases contracts have been let to unqualified contractors employing untrained or undertrained workers. The result has been poor performance, undue time lags, and in some instances the complete stoppage of work at particular sites.

You are of course aware that after nearly four years and hundreds of millions of dollars, the overall cleanup effort is far behind schedule.

We believe that one of the major reasons for the slow and often inadequate cleanup effort is that many responsible and technically competent contractors are simply not bidding this type of work. For the most part these are large, highly sophisticated construction companies that more than qualify to engage in Superfund-related cleanup and remediation activities.

These firms have chosen not to participate or to participate on a limited basis because of the immediate problem related to the diffi-



culty of obtaining, and in some cases the unavailability of, the surety bonds necessary to undertake Superfund activities.

In addition to our own experience with some of these contractors, many of which have national agreements with our union, the surety bond problem has been fully documented by the recent study conducted for EPA by the Corps of Engineers. Unlike some of my colleagues, I won't quote it.

While we are not technically competent to comment on all of the bonding questions raised in this hearing, we do know from experience that much of the Superfund cleanup work that is currently being conducted is being undertaken by one or two nontraditional construction firms who are dominating the market, reducing competition, and effectively contributing to the overall problem.

The National Constructors Association, on the other hand, represents the Nation's foremost construction companies engaged in the design and construction of major commercial, chemical, and process facilities. They have built everything from highways, dams, and subway systems to nuclear powerplants and massive petrochemical facilities. They have the management expertise, technical skills, and access to a highly trained work force. They have the ability and resources to undertake the most complex engineering, design, and construction projects. They represent much more than merely "movers of dirt."

We are absolutely convinced that if the Nation is to proceed with perhaps its most pressing and complex environmental problem, the cleanup and remediation of hazardous and toxic wastes, that these traditional construction companies must be enlisted in the effort. Without them, the Government will continue to squander its resources on piecemeal and inadequate remedies.

To bring about the participation of the most qualified contractors in the Superfund effort requires an immediate legislative adjustment that will permit them to obtain necessary surety bonding.

We have reviewed at least two legislative proposals that have been suggested. We have also noted that the report to the EPA by the Corps of Engineers outlines a number of administrative actions that might be taken to relieve the problem. For our part, we believe that an immediate legislative solution is required to ensure that adequate surety bonding is available to qualified contractor contractors.

Specifically, Mr. Chairman, we would like to make the following brief comments on any proposed legislation.

First, we think that the legislation should provide sureties with the same liability standard and indemnification remedy as response action contractors.

Second, if such bonds are required for Superfund, they should be issued under the requirements of the Miller Act.

Third, the legislation should mandate that if Federal law requires surety bonds, only the obligee on a performance bond should be afforded the right of action on the bond; assuming, of course, that the rights of employees under the Miller Act are fully protected.

Fourth, the legislation should require that the surety bonds carry the condition that response action contractors perform the



work in accordance with the plans and specifications of the contract and that the surety's liability is limited to those conditions.

Finally, Mr. Chairman, there is the issue of the statute of repose. Since there is very little practical experience with the long-term viability of remediated sites, we believe that any statute of limitations should be long enough to guarantee the safety of the public and the environment, while at the same time providing some certainty for those responsible for the cleanup. The one-year statute that has been suggested is far too short a time period, and current law provides for a somewhat indefinite period. We are convinced that a reasonable compromise can be achieved, and we stand ready to work with you and the committee in arriving at an acceptable solution on this and the other issues raised in the hearing.

Thank you, Mr. Chairman.

Senator LAUTENBERG. Thank you both very much.

The administrative side of things seems to have a vote of confidence that I don't always hear, but we want to solve the problem. That's the purpose of this hearing.

Mr. Mallino, I think it is pretty easy to say that a year is too short, and that maybe an indefinite period is not appropriate. You are convinced that a reasonable compromise can be worked out by the people who sit around the table. What do you offer as a reasonable compromise on this?

Mr. MALLINO. Well, Mr. Chairman, in terms of the numbers that have been talked about, I think that the key ingredient is that if a contractor and a surety get a contract to perform a job and carry out certain specifications and requirements of that contract—if in fact that is done and those specifications are met, we frankly think EPA has an obligation to inspect those sites and at some point certify those sites have fully met the contract specifications.

If that can be done, then we think that a time period—and we haven't come up with any magic numbers—ought to be imposed so that there is some certainty to both the contractor and the surety that it has completed its work as it was contracted to do, and therefore has no more liability.

Senator LAUTENBERG. Mr. Early, what do you think of that quality assurance program, and therefore the conclusion of obligation as a result of that?

Mr. EARLY. Well, I shudder to think that we're going to rely completely on EPA. My view is that we need to maximize the incentives here. As I understand it, and I may stand to be corrected, in other construction projects the statute runs from the date that you discover that a problem exists as a result of inadequately performed work, and I believe that same general rule should apply in this case. I don't think it's realistic to expect that EPA is going to discover by site inspection a situation where—let's say, in the context that you're building a lagoon with double liners, and those plastic liners, of course, are glued together. The contractor uses an off-spec glue, and therefore down the road the lagoon starts to leak because of the liners becoming separated.

That's an instance where you're not going to discover that problem immediately. That problem is going to emerge down the road. It's not all that different from a situation where a bridge has been built, and it turns out that the contractor used off-specification ma-

terials on the bridge, causing a problem. Once again, those problems are not going to emerge immediately; they're going to emerge over time. It seems to me that the maximum incentive is created by a "date of discovery" statute of limitations.

Now, does that mean that the surety may charge more for the bond? Probably so, but it seems to me it's a much more practical way to make sure that the public is being protected.

Senator LAUTENBERG. The problem we have—and obviously, this is a search for information—the problem that we have, and virtually everybody agrees, is that we don't have enough surety bond offerors out there to help us reduce several types of risks.

All of us are learning as time goes by; what a difficult assignment we have in the cleanup of these sites. But also, and we have shared these views, it makes us more determined to get them done, and we know that it's worth working on. We know that we have to find means of protecting the public's health. We also, unfortunately, discover that the magnitude of some of these assignments is far greater than was ever anticipated.

I think it's taken longer to get moving than most of us wanted, and I think that includes EPA as well. But we've learned a lot. One of the things we've learned a lot more about is how you prevent these things, and that looks like it's got a good focus, but we've got to clear them up.

The thing I would like to be able to do is at least frame a reference that says that we're protecting the public health, that the job is being thoroughly done, that we have as many people offering services—including bonding—to move the process.

Mr. Early, do you generally support the proposal, these questions that we submitted to you?

Mr. EARLY. Yes, I have the questions.

Senator LAUTENBERG. Question number 9 from the staff regards the Miller Act application here. Do you generally support that proposal?

Mr. EARLY. Yes, we do, Mr. Chairman. We think that the Miller Act should apply. It applies a number of protections to workers that are very important. I'm sorry, I should have included that in my testimony, but I left it out. I did not address that question in my testimony.

Senator LAUTENBERG. I just wanted to ask Mr. Mallino, is there any concern over protecting the rights of employees under the Miller Act?

Mr. MALLINO. We support the requirements of the Miller Act. In my testimony, Mr. Chairman, I put in a caveat under the question that indicated that only an obligee could recover or have a right of action against the contractor, and the caveat is that assuming the rights of the employees under the Miller Act were protected. When we read the language that was submitted to us, it was ambiguous that on the one hand the Miller Act would apply, and therefore Davis-Bacon and service contract protections for workers would also apply. But we were concerned about the second question that indicated that only the obligee could sue the contractor. I talked to the staff and have been assured that the language is okay. We simply want to be sure that if we are covered under the Miller Act,

our rights under this provision, should it become law, would also be protected.

Senator LAUTENBERG. You heard the testimony from the contracting folks and the Insurance Association. Do you have any view of the letter of credit application in terms of—I think you mentioned it, Blake, in your comments—it's offered as one part of a solution, and it leaves out some very significant protections, I think.

Do you have any recommendations to make?

But do you have any recommendations, letter of credit or otherwise, that you think might help us get back on course? You do agree that surety bond sources are important?

Mr. EARLY. I agree that surety bonds are important, and I thought that Ms. Schubert explained quite well why a letter of credit has only limited usefulness. It seems to me that what you want to do is maximize the number of ways you can deal with inadequate or unfulfilled contract work. There isn't any reason why you couldn't use both a performance bond for one piece of it and a letter of credit for another piece of it. Right now the problem is that you don't have those two options. You only have one option, and it seems to me that that's unfortunate.

Senator LAUTENBERG. Yes. I gave you more credit for that than you deserved. It was Ms. Schubert whose testimony was fairly specific about the letter of credit.

The one thing I walk away from here with is that there is a confirmation by all parties that something more has to be done, because we can't leave the issuance of surety bonds—if the surety bond has a place here—solely in the hands of one provider.

Mr. MALLINO. Mr. Chairman, if I may, I may not have made it clear in my testimony, but I would just like to go on record as saying that we agree with the Sierra Club that if any legislative action occurs on this surety problem, that we would join with the Sierra Club in insisting that only the surety problem be dealt with legislatively in this session of Congress. And whatever other questions may come up in the future, we'll leave those for the future, but we are agreed that only this issue should be addressed.

Senator LAUTENBERG. Yes. We are very aware of that. There are lots of people interested in changing the structure, and I doubt that's in the nature of expansion. So we will be very cautious and mindful of what you said.

I thank you all for being here. We are going to adjourn this hearing, but I would also ask the two of you that whatever questions we submit in writing, or have submitted, get responded to quickly. Thanks very much.

[Whereupon, at 12:27 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

[Statements submitted for the record follow:]

STATEMENT OF  
MR. RUSSELL J. CHRISTESEN  
CHAIRMAN EMERITUS  
EBASCO SERVICES INCORPORATED

ON

SUPERFUND BONDING AVAILABILITY

BEFORE THE  
SUBCOMMITTEE ON SUPERFUND, OCEAN AND WATER PROTECTION  
OF THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS  
UNITED STATES SENATE

SEPTEMBER 19, 1990

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE. MY NAME IS RUSSELL CHRISTESEN AND I AM CHAIRMAN EMERITUS OF EBASCO SERVICES INCORPORATED, AND FORMER PRESIDENT AND CHIEF EXECUTIVE OFFICER. IT IS A PRIVILEGE TO APPEAR BEFORE THE SUBCOMMITTEE, REPRESENTING EBASCO, AND THE NATIONAL CONSTRUCTORS ASSOCIATION (NCA), OF WHICH EBASCO IS A MEMBER. NCA IS SUBMITTING A SEPARATE WRITTEN STATEMENT FOR THE RECORD. I AM ACCOMPANIED BY ROBERT BLACKWELL, AN EXECUTIVE IN OUR WASHINGTON OFFICE, WHO WILL ASSIST ME IN RESPONDING TO TECHNICAL SURETY OR CONTRACTUAL QUESTIONS.

EBASCO HAS ANNUAL REVENUES IN EXCESS OF \$1 BILLION, AND PROVIDES ENGINEERING, CONSTRUCTION, ENVIRONMENTAL, ADVANCED TECHNOLOGY AND QUALITY MANAGEMENT SERVICES TO GOVERNMENT CLIENTS, INCLUDING MAJOR ENVIRONMENT CONTRACTS WITH THE DEPARTMENT OF DEFENSE (DOD), THE ENVIRONMENTAL PROTECTION AGENCY (EPA), THE FEDERAL ENERGY REGULATORY COMMISSION (FERC), THE DEPARTMENT OF ENERGY (DOE), AND NASA. EBASCO IS AN EPA SUPERFUND CONTRACTOR IN SOME 40 STATES UNDER THE EPA REMEDIAL ENGINEERING MANAGEMENT (REM) AND ALTERNATIVE REMEDIAL CONTRACTS STRATEGY (ARCS) PROGRAMS.

OUR CONSTRUCTION ARM, EBASCO CONSTRUCTORS, HEADQUARTERED IN LYNDHURST, N.J., HAS BEEN A LEADER IN THE CLEANUP OF GOVERNMENT HAZARDOUS WASTE SITES. FOR EXAMPLE, TWO OF OUR RECENT PROJECTS ARE THE AWARD WINNING BASIN F INTERIM ACTION, A \$36 MILLION CLEANUP AT THE ROCKY MOUNTAIN ARSENAL, AND THE \$52 MILLION BRIDGEPORT RENTAL AND OIL SERVICES (BROS) PROJECT IN NEW JERSEY.

TODAY, EBASCO CONSTRUCTORS COULD NOT BID EITHER BASIN F OR BROS DUE TO THE UNAVAILABILITY OF SURETY BONDS. IN FEBRUARY OF



THIS YEAR EBASCO'S SURETY, SEABOARD ST. PAUL MARINE, INFORMED US THAT IT WILL NO LONGER PROVIDE BONDS FOR HAZARDOUS WASTE WORK. EBASCO HAS INFORMED THE EPA AND DOD OF OUR CRITICAL BONDING SITUATION. EBASCO'S NON-AVAILABILITY ELIMINATES ONE OF THE THREE MAJOR REMEDIATION CONTRACTORS FROM COMPETITION FOR GOVERNMENT CLEANUP CONTRACTS. IT IS IMPORTANT TO NOTE THAT EBASCO IS EXTREMELY WELL-FINANCED AND HAS NO PROBLEM IN BONDING OTHER GOVERNMENT WORK. FOR EXAMPLE, EBASCO RECENTLY BONDED A \$175 MILLION ROCKET TEST FACILITY (J-6) FOR THE DEPARTMENT OF DEFENSE.

EBASCO'S SITUATION IS COMMON ACROSS THE ENVIRONMENTAL CONSTRUCTION INDUSTRY. THE NATIONAL CONSTRUCTORS ASSOCIATION REPRESENTS THE NATION'S FOREMOST FIRMS ENGAGED IN THE CONSTRUCTION OF MAJOR INDUSTRIAL, COMMERCIAL AND PROCESS FACILITIES WORLDWIDE. NCA'S MEMBERS HAVE THE MANAGEMENT EXPERIENCE AND EXPERTISE TO HANDLE THE MOST COMPLEX PROJECTS--JUST THE TYPE OF PROJECTS REQUIRING REMEDIATION UNDER THE SUPERFUND PROGRAM. A NUMBER OF NCA MEMBERS HAVE ASSEMBLED THE TRAINED WORK FORCE NECESSARY TO UNDERTAKE MAJOR ENVIRONMENTAL CLEANUP WORK, SUCH AS THAT CARRIED OUT UNDER THE SUPERFUND PROGRAM. TWO HUNDRED NEW CONSTRUCTION STARTS HAVE BEEN CONGRESSIONALLY MANDATED BY OCTOBER 1991, AND THE PACE OF SITE REMEDIATION ACTIVITIES UNDER THE SUPERFUND PROGRAM MUST BE ACCELERATED. TO ACCOMPLISH THIS, MORE OF THE EXPERIENCED COMPANIES THAT CAN DO THIS COMPLEX WORK MUST BE BROUGHT INTO THE PROGRAM.

TO DATE, NCA'S MEMBERS HAVE CHOSEN TO RESTRICT THEIR INVOLVEMENT IN GOVERNMENT HAZARDOUS WASTE CLEANUP WORK FOR A NUMBER

OF REASONS, THE MOST PRESSING BEING THE UNAVAILABILITY OF SURETY BONDS. EVEN THOSE COMPANIES SUCH AS EBASCO, WHICH HAVE UNDERTAKEN FEDERAL CLEANUP PROJECTS, HAVE BEEN SELECTIVE IN THEIR APPROACH, CAREFULLY ANALYZING THE RISK ON A PROJECT-BY-PROJECT BASIS.

HOWEVER, ALL OF NCA'S MEMBERS, INCLUDING EBASCO, ARE CURRENTLY SHUT OUT OF FURTHER MAJOR SUPERFUND CLEANUP WORK BY THE UNAVAILABILITY OF SURETY BONDS. WE HAVE BEEN ADVISED BY OUR SURETIES THAT THEY WILL NOT PROVIDE BONDING FOR SUPERFUND CLEANUP WORK.

LIMITING THE POOL OF HIGHLY QUALIFIED CONTRACTORS WORKING ON SUPERFUND SITES WILL ADVERSELY AFFECT THE COST AND QUALITY OF CLEANUPS. THIS WILL BE ESPECIALLY EVIDENT ON LARGE, TECHNICALLY COMPLEX REMEDIATION SITES SUCH AS BASIN F. HIGHLY QUALIFIED, WELL-CAPITALIZED COMPANIES, SUCH AS EBASCO, HAVE THE TECHNICAL AND MANAGEMENT CAPABILITIES TO COMPLETE SUCH A PROJECT, WHILE PROTECTING THE HEALTH AND SAFETY OF THE SURROUNDING COMMUNITIES.

THE SURETIES ARE CONCERNED WITH THE IMPOSITION OF LIABILITY FAR BEYOND ITS TRADITIONAL BOND GUARANTEES TO COMPLETE PERFORMANCE. THE SURETIES RECOGNIZE THE POSSIBILITY THAT PLAINTIFFS' ATTORNEYS COULD ATTEMPT TO IMPOSE FINANCIAL RESPONSIBILITY UPON WHOMEVER IS PERCEIVED AS FINANCIALLY CAPABLE OF PAYING FOR COSTS ASSOCIATED WITH A HAZARDOUS WASTE RELEASE. THIS COULD TARGET THE SURETY AS A DEEP POCKET IN THIRD PARTY TOXIC TORT LITIGATION. THE SURETIES' CONCERNS ARE HEIGHTENED BY THE HISTORIC AND CONTINUED UNAVAILABILITY OF ACCEPTABLE POLLUTION LIABILITY INSURANCE TO COVER THE RISKS AND EXTENDED LIABILITY LATENCY PERIODS IN HAZARDOUS WASTE

CLEANUPS. THE UNAVAILABILITY OF ADEQUATE POLLUTION LIABILITY INSURANCE REINFORCES THE SURETIES' CONCERNS THAT THE PERFORMANCE BOND COULD BE TREATED AS A SUBSTITUTE FOR LIABILITY INSURANCE. A PAPER DISCUSSING THE ISSUES OF CONCERN TO THE CONTRACT BOND SURETY WITH REGARD TO HAZARDOUS WASTE LIABILITIES ACCOMPANIES THIS TESTIMONY AND IS SUBMITTED FOR THE RECORD.

THE INFANCY OF THE SITE REMEDIATION PROGRAM, COUPLED WITH THE 10 TO 30 YEAR LATENCY PERIOD FOR THE APPEARANCE OF HEALTH SYMPTOMS FROM WHICH THIRD PARTY SUITS COULD ACCRUE, PRECLUDE AN ACCURATE ASSESSMENT OF POTENTIAL TOXIC TORT ACTIONS BY THE SURETIES. HOWEVER, THE IMPACT OF POTENTIAL LITIGATION ON THE SURETIES IS ACKNOWLEDGED IN THE U. S. ARMY CORPS OF ENGINEERS JULY 1990 REPORT ON "CONTRACTING PROBLEMS RELATED TO SURETY BONDING IN THE HAZARDOUS AND TOXIC WASTE CLEANUP PROGRAM." IN REPORTING CONCLUSIONS FROM THE CORPS' INTERVIEWS WITH THE SURETIES, THE STUDY FINDS THAT,

"MANY OF THESE CONCERNS ARE OF POTENTIAL RISKS THAT ARE HYPOTHESIZED, BUT HAVE NOT YET OCCURRED. HOWEVER, THESE RISKS ARE PERCEIVED AND ACTED UPON AS REAL."

THE CORPS OF ENGINEERS STUDY, DESCRIBED THE RELUCTANCE OF SURETIES TO PROVIDE BONDS TO CONSTRUCTION CONTRACTORS. IN DETERMINING THE EXTENT OF THE PROBLEM AND SEEKING SOLUTIONS, THE STUDY ANALYZED 24 ONGOING REMEDIAL ACTIONS AND COMPLETED CORPS HAZARDOUS AND TOXIC WASTE CONSTRUCTION CONTRACTS, STATISTICS FROM ACTUAL CORPS RECORDS, AND A SURVEY OF CORPS DISTRICT OFFICES, THE CLEANUP INDUSTRY, SURETY FIRMS AND TRADE ASSOCIATIONS. THE STUDY CONCLUDES THAT THE GENERAL UNAVAILABILITY OF BONDING HAS REDUCED CONTRACTOR COMPETITION WITH THE RESULTANT INCREASE IN CLEANUP COSTS BEYOND THE

AGENCIES' ENGINEERING ESTIMATES WITH A POTENTIAL TO "...LESSEN FURTHER THE GOVERNMENT'S ABILITY TO EXPAND CONTRACTOR PARTICIPATION." THE REPORT RECOMMENDS A COMBINATION OF ADMINISTRATIVE AND LEGISLATIVE APPROACHES TO REVITALIZE THE CORPORATE SURETY MARKET.

THE PROBLEM HAS BEEN RECOGNIZED BY THE HOUSE ARMED SERVICES COMMITTEE. ITS REPORT ON THE 1991 DEPARTMENT OF DEFENSE AUTHORIZATION BILL, STATES THAT IT "...HAS BECOME AWARE OF GROWING EVIDENCE THAT THE AVAILABILITY OF SURETY BONDS FOR DEFENSE DEPARTMENT REMEDIATION PROJECTS IS RAPIDLY DECLINING." THE REPORT RECOGNIZES THAT A LIMITED SURETY MARKET WILL MEAN DECREASED COMPETITION AND "...HIGHER COSTS AND LOWER-QUALITY CLEANUP OF DOD HAZARDOUS WASTE SITES." HOUSE AND SENATE REPORTS REQUEST A DEFENSE DEPARTMENT SURETY STUDY TO BE SUBMITTED WITHIN 120 DAYS OF THE BILL'S ENACTMENT. THE HOUSE REPORT ASKS THE DEFENSE DEPARTMENT TO SUBMIT RECOMMENDATIONS FOR LEGISLATIVE CHANGES TO REVITALIZE THE CORPORATE SURETY BOND MARKET FOR HAZARDOUS WASTE CLEANUPS. CONCURRENTLY, THE CORPS STUDY CONCLUDES WITH A RECOMMENDATION TO THE ENVIRONMENTAL PROTECTION AGENCY THAT THE EPA CONSIDER PROPOSING LEGISLATIVE CHANGES TO SUBSTANTIALLY REDUCE THE CONCERNS OF THE SURETY INDUSTRY.

TODAY, THE GENERAL UNAVAILABILITY OF SURETY BONDS FOR ENVIRONMENTAL CONSTRUCTION PREVENTS THE MAJORITY OF CONSTRUCTION COMPANIES FROM BIDDING THE LARGER SITE CLEANUPS. AS FAR AS I KNOW, THIS INCLUDES ALL BUT TWO COMPANIES WHICH SHARE ONE SURETY. THIS SITUATION COMES AT A TIME WHEN THE ENVIRONMENTAL PROTECTION AGENCY

FACES CONGRESSIONAL PRESSURE TO ACCELERATE AND IMPROVE THE EFFICIENCY OF SITE REMEDIATION.

ALONG WITH POSSIBLE DELAYS, THE ABSENCE OF COMPETITION CARRIES A DIRECT FINANCIAL COST TO THE GOVERNMENT. THIS POTENTIAL WAS ILLUSTRATED IN THE RECENT EPA SIKES PITT PROCUREMENT. THE ORIGINAL PROCUREMENT WAS WITHDRAWN WHEN ONLY ONE OF THE TWO BIDDERS WAS ABLE TO SECURE A BOND, DRIVING THE INITIAL BID TO \$138 MILLION, \$48 MILLION OVER THE AGENCY'S ESTIMATE. THE RE-CONFIGURATION OF THAT PROCUREMENT UNDER STATE LAW RESULTED IN INCREASED COMPETITION, INCLUDING EBASCO, WITH A RESULTANT COST SAVINGS TO THE GOVERNMENT OF APPROXIMATELY \$40 MILLION.

SIKES PITT WAS A STATE NOT FEDERAL LEAD CLEANUP. THE SIKES PITT RECOMPETE ALLOWED LETTERS OF CREDIT IN LIEU OF BONDS--A REMEDY AVAILABLE UNDER SOME STATE "LITTLE MILLER ACTS"--AN OPTION INTERPRETED BY MANY AS NOT AVAILABLE UNDER FEDERAL MILLER ACT STATUTE. THE NATURE OF THE WORK AT SIKES PITT INVITED A REALIGNMENT OF THE CATEGORIZATION OF SERVICES AND CONSTRUCTION WORK TO BE PERFORMED--ENABLING A REDUCTION IN THE PORTION OF THE CONTRACT REQUIRING BONDING WITH LESS THAN 100% BONDING REQUIRED. AGAIN, THIS IS NOT A PROTOTYPE FOR ALL REMEDIATIONS. REMEDIATIONS THAT ARE 100% CONSTRUCTION CANNOT BE CATEGORIZED IN PART AS SERVICES WITHOUT BEING IN DIRECT CONFLICT WITH THE DAVIS BACON ACT WAGE REQUIREMENTS. FEDERALLY LED CLEANUPS UNDER THE MILLER ACT ALSO GENERALLY REQUIRE 100% PERFORMANCE BONDING, SO A REDUCTION OF BONDING TO A 20% REQUIREMENT--AS ON SIKES PITT--IS NOT AN APPROPRIATE REMEDY ON MOST FEDERAL PROCUREMENTS.



OUR REVIEW OF THE SITUATION INDICATES THE GOVERNMENT HAS LIMITED ADMINISTRATIVE FLEXIBILITY IN THE SURETY AREA DUE TO THE STATUTORY LANGUAGE OF THE FEDERAL MILLER ACT. BASED ON DISCUSSION WITH OUR SURETY, (A PROVIDER OF 12.5% OF THE BONDS ON THE 24 PROJECTS REPRESENTED IN THE CORPS STUDY), WE BELIEVE A PIECEMEAL ADMINISTRATIVE SOLUTION WILL NOT BE SUFFICIENT TO TRIGGER SIGNIFICANT SURETY PARTICIPATION IN THE CLEANUP PROGRAM. AT MOST, IT MAY MAINTAIN THE CURRENT UNSATISFACTORY LEVEL OF BIDDING ON MAJOR JOBS.

EBASCO BELIEVES THE SITUATION CAN ONLY BE SATISFACTORILY RESOLVED BY STATUTORY CHANGES BECAUSE OF THE LIMITED ADMINISTRATIVE FLEXIBILITY AVAILABLE UNDER THE FEDERAL MILLER ACT, AND THE INABILITY TO ADMINISTRATIVELY WAIVE LIABILITY THAT MAY BE INTERPRETED AS STATUTORILY DERIVED.

TO TRIGGER SIGNIFICANT SURETY PARTICIPATION IN THE CLEANUP PROGRAM, EBASCO BELIEVES THAT A LEGISLATIVE REMEDY MUST BE IMMEDIATELY IMPLEMENTED THAT SPECIFICALLY ADDRESSES THE VALID CONCERNS IN THE FOLLOWING MANNER:

- (1) PROVIDE A FEDERAL NEGLIGENCE STANDARD AND INDEMNIFICATION FOR SURETIES CONSISTENT WITH THAT AVAILABLE FOR RESPONSE ACTION CONTRACTORS WHEN THE SURETY PERFORMS AS A CONTRACTOR THROUGH A TAKEOVER AGREEMENT WITH THE GOVERNMENT;
- (2) LIMIT THE RIGHT OF ACTION ON PERFORMANCE BONDS FOR RESPONSE ACTION CONTRACTS TO ACTION BY THE FEDERAL GOVERNMENT, THE OWNER OF THE BOND. THIS ENSURES THE GOVERNMENT'S RIGHT OF ACTION AGAINST THE SURETY--AND ELIMINATES THE POTENTIAL FOR THIRD PARTY POLLUTION LIABILITY CLAIMS AGAINST A SURETY WHOSE LEGAL RESPONSIBILITY ACCORDING TO ITS BOND TERMS IS CONTRACT COMPLETION AND PAYMENT OF BILLS;
- (3) ESTABLISH A TIME LIMIT FOR ACTION ON THE BOND; CONSISTENT WITH PERFORMANCE AND PAYMENT BOND

WARRANTY AND CASE LAW PRECEDENT THUS AVOIDING VULNERABILITY TO LATENT LIABILITY CLAIMS;

- (4) PROVIDE FOR THE SURETY'S LIABILITY ON THE BOND ONLY FOR THE COST OF COMPLETION OF THE CONTRACT WORK UP TO THE PENAL SUM OF THE BOND, TO PRECLUDE A "DEEP POCKET" TOXIC TORT ACTION.

IN SUMMARY, EBASCO BELIEVES THAT THE LACK OF SURETY BONDS FOR SUPERFUND CLEANUP PROJECTS WILL CAUSE SEVERE DISRUPTIONS IN THE PACE AND QUALITY OF THE CLEANUP PROGRAM. THE CONSEQUENCES OF A CONTINUED ABSENCE OF SURETY BONDS FOR THESE PROJECTS HAS ALREADY REDUCED TO TWO THE NUMBER OF COMPANIES ABLE TO BID ON LARGE PROJECTS. WE ANTICIPATE A DELAY IN THE PROCUREMENT PROCESS DUE TO MINIMAL PARTICIPATION, WITH INCREASED COSTS, DELAYING THE OBLIGATION OF FUNDS AND EXECUTION OF CLEANUPS. WE ALSO ANTICIPATE A DIMINISHED POOL OF TALENT AND TECHNOLOGIES AVAILABLE FOR CLEANUP AT A TIME WHEN EPA IS UNDER INCREASED PRESSURE TO ACCELERATE THE PACE OF ITS REMEDIATION.

EBASCO AND NCA OFFER THEIR ASSISTANCE IN WORKING WITH THE COMMITTEE, THE EPA, AND THE DEPARTMENT OF DEFENSE TO RESOLVE THIS CRITICAL PROBLEM. COPIES OF EBASCO'S LETTERS TO ADMINISTRATOR WILLIAM REILLY AND DEPUTY ASSISTANT SECRETARY OF DEFENSE (ENVIRONMENT) THOMAS E. BACA DISCUSSING THIS SITUATION AND OFFERING OUR ASSISTANCE, ACCOMPANY OUR TESTIMONY, AND ARE SUBMITTED FOR THE RECORD.

MR. CHAIRMAN - WITHOUT THE RECOMMENDED DRAMATIC LEGISLATIVE ACTION - WE ARE OUT OF THE PUBLIC SECTOR CLEANUP PROGRAM - AT A TIME WHEN HIGHLY QUALIFIED CONTRACTORS AND WELL-TRAINED WORK FORCE ARE CRITICAL TO MEETING THE NEEDS OF THE FEDERAL AGENCIES AND MEETING THE ENVIRONMENTAL CONCERNS OF OUR COUNTRY.

**EBASCO SERVICES INCORPORATED****EBASCO**

Two World Trade Center, New York, N.Y. 10048-0752, (212) 839-2200

Richard F. Albosta  
Chairman of the Board,  
President and Chief Executive Officer

August 21, 1990

The Honorable William K. Reilly  
Administrator  
U.S. Environmental Protection Agency  
401 M Street, SW  
Washington, D.C. 20460

Dear Mr. Reilly:

I am writing to inform you that Ebasco Services Incorporated and its subsidiary, Ebasco Constructors Inc., have been informed by their surety company that it will not provide bonds to Ebasco Constructors for Superfund site remediation work. This is due to our surety's concern with regard to the imposition of liability, far beyond its traditional role of ensuring that a project is completed and all the bills are paid.

As you know, Ebasco Services is a Superfund contractor in 40 states under the REM and ARCS programs. Ebasco Constructors has been a leader in the cleanup of hazardous waste sites for the last several years. The Basin F interim action, a \$36 million cleanup at the Rocky Mountain Arsenal, performed for the Corps of Engineers, and the \$52 million BROS project in southern New Jersey are two of our recent projects. BROS is one of the largest EPA-Superfund remediation projects to be let to date. Ebasco Constructors could not bid Basin F or BROS today due to surety market conditions.

Ebasco Constructors' situation is the norm across the construction industry. The bonding requirement for Federal construction contracts under the Miller Act, precludes the majority of construction companies, all but two that I know of as of this writing, from bidding the larger Superfund site cleanups. This situation comes at a time when the Environmental Protection Agency faces 200 Congressionally mandated Superfund new construction starts by October 1991, with 149 sites now ready for remedial action.

Along with possible delays, the absence of competition carries a direct financial cost to the Superfund. This potential was illustrated in the first Sikes Pit procurement, when only one bidder was able to secure a bond, driving the initial bid to \$138 million, \$48 million over the Agency's \$89.9 million estimate.

continued.....

August 21, 1990  
Page 2.

The Honorable William K. Reilly  
Administrator  
U.S. Environmental Protection Agency

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Limiting the pool of highly qualified contractors working on your sites will also affect the quality of Superfund cleanups. This will be especially evident on large technically complex remediation sites where highly qualified, well capitalized companies, such as Ebasco Constructors have the technical and management capabilities to complete the project while protecting the health of the surrounding communities.

Our initial review of the situation indicates that the Environmental Protection Agency has limited administrative flexibility in the surety area due to the statutory language of the Miller Act. We believe a piecemeal administrative solution will not be sufficient to trigger significant surety participation in the cleanup program. At most, it may maintain the currently unsatisfactory level of bidding on major jobs. We believe the situation can only be satisfactorily resolved by basic statutory changes which we hope you will support. Recommended statutory changes are now being jointly developed by representatives of the surety and construction industries.

I offer my assistance in working with the Environmental Protection Agency to assist your efforts to resolve this critical problem. Please feel free to contact me or Bob Blackwell in our Washington office (202/872-1352) regarding this matter. For your information, I have sent similar correspondence to the Department of Defense outlining our concerns on the surety issue.

Very truly yours,



Richard F. Albosta  
Chairman of the Board  
President and  
Chief of the Board

RFA:JRB

cc: F. Henry Habicht, DA  
Don Clay, AA OSWER  
Henry L. Longest, Dir. OERR  
Bruce M. Diamond, Dir. OWPE  
E. Donald Elliott, AA and General Counsel

**EBASCO SERVICES INCORPORATED****EBASCO**

Two World Trade Center, New York, N.Y. 10048-0752, (212) 839-2200

Richard F. Albosta  
Chairman of the Board,  
President and Chief Executive Officer

August 21, 1990

Mr. Thomas E. Baca  
Deputy Assistant Secretary of Defense (Environment)  
Room 3D833  
The Pentagon  
Washington, D.C. 21301-8000

Dear Mr. Baca:

I am writing to inform you that Ebasco Services Incorporated and its subsidiary, Ebasco Constructors Inc., have been informed by their surety company that it will not provide bonds for Department of Defense remediation sites or Superfund site remediation work, many of which are administered by the Corps of Engineers. This is due to our surety's concern with regard to the imposition of liability, far beyond its traditional role of ensuring that a project is completed and all the bills are paid.

As you know, Ebasco Services is a large environmental engineering and consulting firm with major contracts with the Department of Defense, the Environmental Protection Agency, the Federal Energy Regulatory Commission, the Department of Energy and NASA. Ebasco Constructors has been a leader in the cleanup of hazardous waste sites for the last several years. The Basin F interim action, a \$36 million cleanup at the Rocky Mountain Arsenal, performed for the Corps of Engineers, and the \$52 million BROS project in southern New Jersey are two of our recent projects. BROS is one of the largest EPA-Superfund remediation projects to be let to date. Ebasco Constructors could not bid Basin F or BROS today due to surety market conditions.

Ebasco Constructors' situation is the norm across the construction industry. The bonding requirement for Federal construction contracts under the Miller Act, precludes the majority of construction companies, all but two that I know of as of this writing, from bidding the larger site cleanups. This situation comes at a time when the Department faces Congressional pressure to accelerate site remediation.

continued.....



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Mr. Thomas E. Baca  
Deputy Assistant Secretary of Defense (Environment)  
The Pentagon

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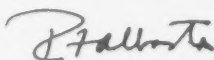
Along with possible delays, the absence of competition carries a direct financial cost to the Department of Defense. This potential was illustrated in the recent EPA Sikes Pit procurement, causing the withdrawal of the original procurement when only one bidder was able to secure a bond, driving the initial bid to \$138 million, \$48 million over the Agency's \$89.9 million estimate.

Limiting the pool of highly qualified contractors working on your sites will also affect the quality of cleanups. This will be especially evident on large technically complex remediation sites (Basin F) where highly qualified, well capitalized companies, such as Ebasco, have the technical and management capabilities to complete the project while protecting the health of the surrounding communities.

Our initial review of the situation indicates that the DOD has limited administrative flexibility in the surety area due to the statutory language of the Miller Act. We believe a piecemeal administrative solution will not be sufficient to trigger significant surety participation in the cleanup program. At most, it may maintain the currently unsatisfactory level of bidding on major jobs. We believe the situation can only be satisfactorily resolved by basic statutory changes which we hope you will support. Recommended statutory changes are now being jointly developed by representatives of the surety and construction industries.

I offer my assistance in working with the DOD to assist your efforts to resolve this critical problem. Please feel free to contact me or Bob Blackwell in our Washington office (202/872-1352) regarding this matter. For your information, I have sent similar correspondence to the Environmental Protection Agency outlining our concerns on the surety issue.

Very truly yours,

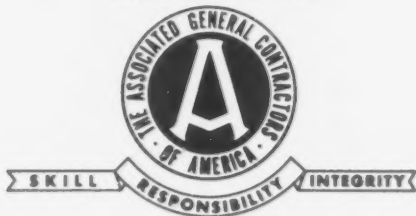


Richard F. Albosta  
Chairman of the Board,  
President and  
Chief Executive Officer

RFA:JRB

**Testimony of  
Warren B. Diederich**  
on Behalf of  
**The Associated General Contractors of America**  
Presented to the  
**Superfund, Ocean and  
Water Protection Subcommittee**  
of the  
**Committee on Environment and Public Works**  
**United States Senate**  
On the Subject of  
**Bonding Difficulty for Contractors on  
Hazardous Waste Remediation Projects**

September 19, 1990



**AGC is:**

- More than 32,500 firms including 8,000 of America's leading general contracting firms responsible for the employment of 3,500,000-plus employees;
- 102 chapters nationwide;
- More than 80% of America's contract construction of commercial buildings, highways, industrial and municipal-utilities facilities.

The Associated General Contractors of America  
1957 E Street N.W., Washington, D.C. 20006-5199, (202) 393-2040, Fax (202) 347-4004

My name is Warren Diederich and I am a general construction contractor from Fargo, North Dakota. My firm, Industrial Builders Inc., has undertaken groundwater protection work at hazardous waste sites for private owners. I am here today representing the Associated General Contractors of America. AGC and its 102 chapters nationwide represents more than 32,500 firms, including 8,000 general contracting companies. With me is Brian Deery from AGC's national staff.

AGC is pleased to be given this opportunity to testify on the difficulties contractors are having in obtaining surety bonds to undertake hazardous waste cleanup work for the Federal government, whether in the Superfund program or the Department of Defense's Environmental Restoration program. The problem is very real, it is widespread and it is significantly reducing competition for this work. Reduced competition will result in higher cleanup costs because it will diminish the available pool of qualified contractors able to do this work.

To understand the significance of the unavailability of surety bonds to a contractor it is important to understand what a surety bond is. A prerequisite for bidding on any federal construction contract is that the contractor provide bid, payment and performance surety bonds. This requirement is mandated by the Miller Act.

A bid bond guarantees that the contractor will undertake the work for the price bid.

A payment bond guarantees that the contractor will pay suppliers and

subcontractors for materials and work related to the project.

The performance bond guarantees full and faithful performance of the contract requirements by the contractor.

Surety bonds thus guarantee that the federal government will receive a completed project with no incumbrances.

Surety bonds also serve as a prequalification mechanism. Surety firms closely scrutinize the contractor's track record, financial capacity, experience of key employees, experience with the type of work being proposed and many other factors before agreeing to provide surety bonds. In this way surety firms help ensure that federal construction contracts are only awarded to qualified contractors.

Without surety bonds a contractor need not bother to submit a bid on a federal construction project. This is also true of remedial action contracts for hazardous waste cleanup which are to be let by a federal agency. Sureties can play an important role in ensuring that only qualified contractors perform hazardous waste cleanup work.

Surety firms are becoming increasingly concerned, however, about their exposure to third party tort liability claims because of the inadequacies of the insurance available to hazardous waste cleanup contractors. Surety firms are concerned that their liability will be extended beyond that traditionally covered by

performance and payment bonds to tort claims as well. As a result, surety firms are currently very reluctant to provide bonds to contractors for hazardous waste work where there is no indemnification or other liability limitations for the contractors and the surety firms. In some instances surety firms have decided not to provide bonds for contractors for any work if the contractor has undertaken hazardous waste work.

Such action is a significant disincentive to undertaking remedial action contracts because, as I have pointed out, without surety bonding the construction contractor is locked out of the federal construction market, and much state and local public work as well.

My firm has undertaken Federal construction projects and other public work in numerous states and never experienced difficulty in obtaining bonding for those projects. Several years ago my firm made the decision to pursue hazardous waste cleanup work. My firm made a major investment in two deep trenching machines which are used for remediation of contaminated groundwater. We have been successful in obtaining numerous contracts with private firms to perform hazardous waste remediation work. However, despite our track record as a contractor and our experience with hazardous waste remediation, we have not been able to obtain any Federal contracts for hazardous waste work because we cannot get the necessary bonding.

My story is not unique. AGC has heard the same story from many contractors throughout the nation. As you are no doubt aware, the Army Corps of



Engineers, which acts as the contracting agency for the Environmental Protection Agency on certain Superfund projects, recently conducted a study on the bonding situation based upon the Corps' experience in awarding Superfund contracts. Perhaps the most telling fact contained in the study is that, of the more than 400 construction firms which are on the Corps' Omaha District bidders list of firms who have expressed an interest in bidding on hazardous waste cleanup projects, only 24 have bid on this work and only 14 have been awarded remediation contracts. The study also shows that the number of bidders per remediation contract has declined over the past three years from 6.2 in 1987 to 4.6 in 1989.

AGC is aware of four contractors, three of whom are New Jersey contractors, who sought but were unable to obtain bonding to bid on remediation work at the Helen Kramer Landfill in New Jersey which is a Superfund project awarded by the Corps of Engineers in September 1989. It is significant to note that there were only four bids submitted on this project. The award amount was \$55.7 million which was 55 percent higher than the government's estimate for the cost of doing this project. If the four additional contractors had been able to obtain bonding there would obviously have been twice as many bidders for the work. While there is no way of determining that any of these four excluded bidders would have submitted a lower bid price, the point is that the competition for this project was significantly less than it otherwise could have been.

With regard to possible solutions to this problem, AGC endorses several proposals made by the surety industry as follows:

- The law should clarify that surety bonds are to be used as bid, performance and payment guarantees only and not as an insurance of last resort for third party tort liability claims;
- Indemnification provided to the contractor under section 119 of the Superfund Amendments and Reauthorization Act, or under any other authority, should be extended to the surety firm;
- Surety bonds should have a termination date certain following completion of the project.

In conclusion, AGC believes that the Federal government's hazardous waste cleanup program will benefit significantly from increased involvement by the many qualified construction firms eager to enter this market. AGC believes that the increased involvement by these many qualified construction firms will significantly enhance competition for these projects, naturally leading to lower prices and greater innovation in cleanup procedures. This will only happen when surety bonds become more readily available to the many qualified construction firms interested in doing this work. AGC urges this Subcommittee to closely consider the proposals of the surety industry and expeditiously act to resolve this problem.

**STATEMENT  
OF THE  
AMERICAN  
INSURANCE  
ASSOCIATION**

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TESTIMONY  
OF  
LYNN M. SCHUBERT  
SENIOR COUNSEL  
AMERICAN INSURANCE ASSOCIATION  
ON SURETY BONDS AND SUPERFUND  
BEFORE THE  
SUBCOMMITTEE ON SUPERFUND, OCEAN AND WATER PROTECTION  
OF THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS  
U.S. SENATE  
SEPTEMBER 19, 1990

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The American Insurance Association is a national  
trade organization of casualty insurers.

## PROFILE

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**T**he American Insurance Association is a full-service trade organization of casualty insurance companies. In its present form, the association combines three earlier organizations. One of those, the former National Board of Fire Underwriters, was organized in 1866, making it one of the oldest trade associations in the nation.

The various departments provide members with up-to-date intelligence on legislative, regulatory, judicial and technical developments relating to our industry. The AIA also maintains liaison with insurance regulators, federal and state lawmakers, other state and federal government officials, insurance and non-insurance industry groups and media—supplying information and assistance on issues of mutual concern.

A countrywide system of regional offices and local legislative counsel ensures prompt and rigorous attention to casualty insurance matters. At the same time, technical specialists from disciplines as diverse as law, economics and engineering educate members and outside publics on developments that may affect the industry and its services to the insurance-buying public.

### Surety Bonds and Superfund

The American Insurance Association is a trade association representing major property and casualty insurers across the United States. Many of these insurers write both liability insurance and surety bonds. These members are concerned about the lack of availability of surety bonds for Superfund contracts. The AIA appreciates the opportunity to testify before you today, and will attempt to address the issues involved by responding to the questions posed by the Subcommittee in its September 13, 1990 Memorandum to possible witnesses.

#### 1. Availability of Bonding

##### Availability

There is a crisis developing in the Superfund program which must be addressed by legislation. In order to clean up the hazardous and toxic waste (HTW) sites in the U.S. there are many issues which must be resolved. However, one of those issues only recently has come to the forefront of attention, yet has rapidly developed into the most critical and immediate issue facing the program: who will stand behind the clean up contractor and guarantee that some money will be available to complete the contract if the contractor fails to perform? The federally prescribed method for this guarantee is surety bonds.

This essential element in the operation of HTW cleanup projects rapidly is becoming unavailable. Without these bonds, cleanup of HTW sites cannot proceed. Much of the work involved in the contracts for HTW cleanup is construction of one sort or another. Under 40 U.S.C. 270a-270d, commonly referred to as the Miller Act, contracts for the "construction, alteration, or repair of any public building of the United States" require the furnishing of a performance bond and a payment bond. The performance bond is for the protection of the United States, and guarantees the cost of performance of the contract, up to a penal sum. The payment bond is for the protection of persons supplying labor and materials in the prosecution of the work, also up to a penal sum.

All states have an analogous public works statute, commonly referred to as the Little Miller Act. These statutes vary, but generally follow the form of the federal Miller Act. Pursuant to these statutes, contractors for HTW cleanup must furnish surety bonds. If the contractor is unable to do so, it cannot be a responsible bidder for the work.

Very few contractors are able to obtain surety bonds for these projects, both on state lead and federal lead projects. This fact led the U.S. Environmental Protection Agency to commission the U.S. Army Corps of Engineers to conduct a study into the problems with surety bonding on HTW sites. The study investigated the surety bond market for these types of projects



generally, as well as examining twenty-four specific Corps of Engineers HTW cleanup projects. The Corps found that sureties indeed are reluctant to issue bonds for these types of projects. According to the report issued by the Corps of Engineers in July 1990, Hazardous and Toxic Waste (HTW) Contracting Problems: A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program ("Corps Study"), "This surety industry reticence has precluded some firms from being able to secure needed bonding and has also lessened the opportunity for firms wishing to break into the Federal HTW marketplace." 1/

While the Corps found that nine sureties had issued bonds for Corps HTW projects from June of 1987 through September of 1989, the number of participating sureties decreased significantly during that time. A look at the list of projects awarded and the sureties on those projects reveals that sureties participating in the program in early 1987 are no longer participating. This is evidenced not only by the fact that the surety is not listed on any 1989 projects, but also by the fact that the contractor using that surety in 1987 and 1988, has a different surety in 1989.

Currently it is our understanding that fewer than five sureties are writing bonds for government HTW cleanup projects. At least two sureties who have written some of these bonds in the past, Seaboard Surety Company and Federal Insurance Company, no longer are writing bonds for HTW cleanup projects. This comes from the uncertainty as to a surety's liability on these projects.

As important as the limited number of sureties participating in the market is the extent of their participation. Each of the participating sureties is writing these bonds for one or two extremely large contractors. While these sureties apply their normal underwriting procedures when examining requests for these bonds, they are applied in a much stricter fashion. For example, for a normal surety bond a surety looks, among other things, at the experience of the contractor in the type of work in question, the character of the principals of the business, the capacity of the contractor to take on the project, and the financial strength of the contractor. For HTW cleanup projects financial strength takes on a greater importance than for normal construction projects.

The American Insurance Group is one company currently writing bonds for these projects. AIG is writing these bonds only for the largest contractors, those with extraordinary financial strength. For anything less than the largest contractor, AIG is requesting the contractor to post collateral. It is our understanding that the Reliance Insurance Company also has expressed an interest in writing these bonds, but we are unaware if any have been written, or what the underwriting standards will be.

No other surety is expressing any willingness to participate in this market. If bonds are written by such sureties, it is on an accommodation basis for one of their largest customers which they do not want to lose. Changes must be made to bring more sureties into the market and to expand the client base of those sureties for these projects beyond the megacontractor.

#### Causes of Unavailability

The unavailability of surety bonds is being caused by a number of factors. To understand the difficulties in bonding HTW projects, it is necessary to understand just what a surety bond is.

What is a surety bond?

When someone acts as a surety, he essentially promises to pay for the debt of another party if that party does not pay. There are many types of surety bonds in use today. The bonds at issue here are threefold: bid bonds, performance bonds and payment bonds. Each of these bonds has a "penal sum", that is, the limit of the liability of the surety is limited to the amount specified in the bond. A bid bond is issued when contractors bid on public construction work. This bond states that if the contractor is awarded the contract, the surety will pay a sum of money if the contractor fails to enter into the contract.

A performance bond is issued after the contractor is awarded the contract. This bond guarantees that if the contractor does not perform the contract in accordance with the plans and specifications and the terms of the contract, the surety will either hire a completion contractor to perform the work, pay for the completion of the work by the owner, or pay the amount of the bond.

A payment bond also is issued after the contractor is awarded the contract. This bond guarantees the payment of certain subcontractors and suppliers on the project.

Liability of the surety on each of these bonds is limited by the penal sum of the bond.

When a surety receives a request to issue a bond for a contractor, the surety begins an extensive underwriting process. This involves obtaining financial and other confidential information about the contractor's business and the principals of the company. Among other things, the surety considers the type of work performed by the contractor in the past, his qualifications to perform the type of work involved in the contract in question, and the risk the contract poses to the rest of the contractor's operations. The surety underwrites the contractor as a whole, not just one project.

As discussed above, the federal Miller Act requires surety bonds for all federal construction work. Since most hazardous

waste remediation projects involve excavation and moving of dirt, as well as standard construction of facilities for disposing of the waste, these projects are at least part construction projects, and thus require surety bonds.

On the last few jobs awarded surety bonds have been few and far between. Very few sureties are willing to write these bonds, and those that will, will write them only for the very largest contractors.

Many sureties have stated that their concern is due to a perceived lack of certainty as to their liability for claims other than those traditionally covered by performance and payment bonds, i.e., performance of the work in accordance with the plans and specifications and payment of covered subcontractors and suppliers on the project. Under the current state of the law it is unclear that a surety for a Response Action Contractor (RAC) will not be subjected to liability for tort claims as well as traditional payment and performance bond claims, perhaps even under strict liability. This liability might even be extended to claims which are not sustainable against the principal.

For example, under normal circumstances the liability of a surety is measured by the liability of its principal. Under Section 119 of the Superfund Amendments and Reauthorization Act of 1986 (SARA) a cleanup contractor or RAC is no longer subject to "strict liability" for actions brought due to the hazardous waste site, but rather, is liable only under a negligence standard. However, under the Federal Comprehensive Emergency Response Compensation and Liability Act (CERCLA), any party who generates or contracts for the disposal, transport or treatment of hazardous waste may be strictly liable for claims made due to the removal. Should a RAC be defaulted on a project, the surety, under traditional surety principles, normally would have the right to hire a completing contractor to finish the project. However, under CERCLA it could be construed that the surety, by taking over a defaulted contract, has contracted for the removal of hazardous waste, and has subjected itself to strict liability, a standard greater than that of its principal. This is clearly inequitable, but not unfeasible under the current state of the statutes.

Further, there is no statutory definition of the types of claims covered under the bonds. Normally performance and payment bonds do not provide coverage for liability claims. However, environmental law is an area rife with expansion of insurance liability far beyond those claims originally anticipated by the contracting parties. Twenty years from now when a liability claim is made on a hazardous waste cleanup project and there is no liability insurance and no RAC capable of satisfying the claim, the surety bond may be the only avenue left for payment to the injured party. Such a misconstruction of policy terms is not unheard of in current court decisions relating to personal injury and environmental damage.

Another concern of the sureties is the cleanup contract itself. A surety bond covers construction. It normally does not cover design. Many of the contracts being proposed for Superfund cleanup are design-build projects requiring surety bonds for the entire project -- both the design of a state-of-the-art technology for disposing of the waste and construction of the requisite facility. While sureties do guarantee many contracts that include design liability, they would be uncomfortable in underwriting a bond which would guarantee this type of state-of-the-art technology. This is traditionally covered by professional errors and omissions policies, which probably will not be available for these risks.

There also exists the question of when the bond liability terminates. It is necessary that the liability terminate when the contract has been completed and all appropriate claims by subcontractors and suppliers on the project have been paid. A surety bond is not a long-term insurance policy which is designed to pay claims far into the future. There must be a date after which no further claims will be entertained.

The EPA §119 indemnification guidelines recognize that a lack of indemnification for the RAC could mean that sureties will be reluctant to provide performance and payment bonds for Superfund projects 2/.

Any indemnification must run to the surety.

Indemnification by the EPA or the contracting authority could be of some benefit, but not as currently proposed.

Rather, the proposed indemnification guidelines would not solve even the one issue of protection of sureties from third party liability. The first and foremost problem is that the proposed indemnification does not specifically run to the surety. Therefore, if a surety who has written the statutorily required bonds for the RAC takes over and completes the project, it will not be provided with the same protection that its principal has under the same contract, regardless of whether it is considered an arranger or merely the completing surety. Since there is no viable pollution liability insurance, and no realistic expectation of any, indemnification is the only mechanism available for the protection of the RAC and the surety. However, unless the indemnification runs to the surety, the surety loses any benefit of the indemnification if the contractor defaults on the project. If indemnification is important to encourage RAC participation in Superfund cleanup, it is just as important for the surety. However, the indemnification must run to the surety.

The RAC and the surety are not the parties responsible for the creation of the hazardous waste site, but the ones who are cleaning up a toxic situation. These parties should be protected from the "probable and catastrophic risk" of loss cited by the EPA's Indemnification Task Force. 3/

Congress contemplated that indemnification would relate to the "nature and magnitude" of the risks facing RACs, 4/ taking into account that liabilities may "potentially exceed both the contract amount and the company's net worth." 5/ EPA indemnification is to address "the legitimate long-term liability concerns of contractors." 6/ A surety which provides the required bond allowing the RAC to perform hazardous waste cleanup should be similarly protected.

## 2. Case Law

AIA is unaware of any federal or state judicial cases where a surety has been held liable or sued specifically for Superfund liabilities associated with surety bonds issued to a Superfund cleanup contractor. However, those projects which are complete have not been completed for long, and those which are still being performed are not necessarily ripe for suit at this time. Additionally, bonds are being written on such an extraordinarily limited basis, that the contractors receive even more prequalification from the surety than normal. Only the largest contractors are performing the work. While this may increase the cost of the projects, these contractors are not likely to perform the work in such a manner as to leave their surety open to suit during the performance of the work. This does not address, however, the possibility of suits many years after the work is complete and the contractor has moved on to other projects.

We believe that the potential liability is analogous to both asbestos litigation and pollution liability litigation. Thirty years ago no one could have predicted that asbestos would be considered an unsafe product. The state-of-the-art technology being used on these projects may turn out to be the next asbestos. Sureties are not prepared to take the chance of being the only "deep pocket" available when this occurs. Although a surety bond does not provide coverage for tort liability suits, that would not necessarily prevent a court from finding coverage.

Many of the recent decisions on pollution liability policies are examples of similar reaching by the courts. For example, the standard pollution exclusion in many general liability, umbrella, and excess liability policies contains two basic sections: an exclusion from coverage of all claims arising out of the "discharge, dispersal, release or escape" of pollutants and a narrow exception to the exclusion that maintains coverage where the polluting discharges are "sudden" and "accidental." Some courts have read the pollution exclusion out of the policy by interpreting it in a way that would make it synonymous with the "expected or intended" damage limitation. These decisions ignore the temporal aspects of "sudden" and focus on the conduct and intentions of the policyholder rather than the nature of the release. 7/ It is just this type of misconstruction which the sureties would like to have headed off by legislation prior to issuing these bonds.

Additionally, there are a few surety cases where a surety has been held liable for tort claims. 8/ While these are a rare



misconstruction of the bond, they do exist as examples of what courts can do when there is an uncompensated plaintiff. The surety cannot run the risk of losing the entire insurance company due to the capriciousness of the judicial system.

3. Data on Bonds Issued

AIA is unable to gather the data requested on all bonds issued since the beginning of the Superfund program. However, the Corps Study states that twenty-three have been issued from June of 1987 through September of 1989. This includes one issued by an individual surety. Additionally, one project was let with an escrow, rather than a bond. Importantly, however, the number of sureties issuing these bonds decreased during that time period, and continues to decrease.

4. Effects on Contracting

There is no question that the unavailability of bonding is negatively impacting Superfund cleanup contractors, and thus the program itself. The Corps Study establishes that only three contractors were awarded over sixty percent of the dollar value of HTW cleanup projects during the time studied. This lack of competition clearly affects the cost of projects. In fact, in four instances the Corps was unable to award the contract to the lowest bidder because that contractor was unable to secure a surety bond. The total of these four contracts was about \$31 million. The additional costs incurred due to the lack of bonding on these four contracts was \$3.9 million.<sup>9/</sup>

However, this additional cost is compounded by the fact that the contractors who are most qualified in the area of performance, are not necessarily the same as those who have significant financial strength. As stated by the Corps, "Even more disconcerting is the fact that firms which are most experienced in accomplishing HTW work are in some instances being precluded from competing for such work by their inability to secure the required bonds." <sup>10/</sup>

The unavailability of surety bonds must be addressed.

5. Non-legislative Approaches

The AIA does not believe that non-legislative approaches are adequate to resolve the majority of the issues preventing sureties from participating in this market. Of all of the issues raised in this testimony, only that of design/build can conceivably be resolved administratively. The EPA can structure its contracting process so that the design of the cleanup project is not part of the same contract as the construction. If this is done, then the design contract would fall under the classification of "service" and would not require a surety bond. The surety's liability would be limited to the construction contract.

As to the other issues concerning the sureties, however, administrative or regulatory solutions are not sufficient. Legislation is necessary to resolve the unintended liability



potentially imposed on sureties by Superfund.

As discussed above, under current law a surety arguably is liable under a more strict standard than its principal, the response action contractor (RAC). Under CERCLA, a RAC is held to a standard of negligence. However, under SARA, anyone who arranges for the cleanup of a Superfund site is strictly liable for any damages arising from that site. If a RAC defaults on a Superfund contract, the surety for that RAC has a responsibility under its performance bond to ensure that the contract is performed in accordance with the contract documents, up to the penal sum of the bond. One way to fulfill this responsibility is to hire a completing contractor. By hiring someone to cleanup the site the surety arguably could be considered an arranger, and thus, strictly liable. Although the liability of a surety historically is coextensive with that of its principal, in this instance the surety would have a greater liability than its principal the RAC. This is because the RAC's liability is defined by statute.

This potential conflict between the liability standards of a RAC and its surety cannot be resolved by regulation. Since the standards are imposed by statute, a court would be free to interpret them as it sees fit. A regulation passed by a federal agency would not prevent a court from interpreting this statutory language to hold a surety to strict liability. Only legislative language clarifying the standard of liability of a surety on a Superfund site can resolve the potential conflict in the statutory language.

Another concern of the surety is the lack of authorization in the legislation for indemnification of a surety of a RAC. It is not clear that the EPA is authorized by law to provide indemnification to such a surety, as well as the RAC. While an internal agency interpretation that such indemnification is possible would allow the agency to offer the indemnification, it does not prevent a court from reviewing the matter and determining that the agency acted outside its authority and that the indemnification is void. It also does not prevent a later administration in the agency from making a similar determination and terminating the indemnification contracts previously awarded. Clarification of the surety's entitlement to indemnification is the only way to ensure the legality of the issue.

Sureties also have expressed concern that the surety bonds might be interpreted to extend coverage for third party tort claims arising out of cleanup projects. While surety bonds normally do not provide coverage for such claims, as discussed above, the history of court decisions in environmental law teaches that courts frequently expand coverage far beyond those claims originally anticipated by the contracting parties. A clear legislative definition of what is covered under the bonds is the only possible way to attempt to limit the courts in their expansion of the contract terms. While, again, an agency regulation on this matter would be instructive, it would not be binding on a state court

interpreting the bond and public policy.

The last concern of the sureties which we believe must be addressed through legislation is that of a date for the termination of the bond. Surety bonds on construction projects are designed to cover performance of the work and payment of subcontractors and suppliers. Under the circumstances of a normal construction project those claims are determined shortly after the project is substantially complete, or accepted by the owner. In fact, in many states there is a special time limit within which claims under the bonds must be brought. In states without a time limit, a time limitation contained in the bond has been upheld as constitutional, and not against public policy.

On the federal level, however, sureties are concerned that a court with an injured plaintiff and no other deep pocket would not accept such an argument. There is substantial precedent for a short, specific time limitation for claims under the bond, both in the states and in the federal arena. The amendment to the Surface Mining Reclamation Land Act passed this year is a good example. In that case sureties were concerned about long-term liability from remining and reclamation of surface mines. The statute as passed states that the bond shall terminate not later than two years after the "last augmented seeding, ... or other work pursuant to the reclamation plan ... ."

CERCLA itself contains precedent for such a termination date. Under the limitation of actions section of CERCLA, claims by the government for damages to natural resources must be brought within three years from completion of the response action. A response action contract many times includes long term operation of a facility. Additionally, the potential for harm arising long after the project is complete is much greater with this type of work than with a normal construction project. It is analogous to surface mining and reclamation. A surety bond is not a long-term liability policy which is designed to pay claims into the future. There must be a date after which no further claims will be valid. Again, legislation is necessary to ensure that this termination of the bond is correctly interpreted by the courts.

The surety industry believes that the surety bond problem must be solved now. It is our belief that the only solution which will encourage a significant change in the market for these bonds is legislative.

#### 6. Alternatives to Bonding

Under current law the only alternatives to surety bonds available for Superfund cleanup projects are contained in the Federal Acquisition Regulation (FAR) as including, "United States bonds or notes, ... certified or cashier's check, bank drafts, Post Office money order, or currency".<sup>11</sup> While these provide monetary protection to the government, they do not provide any claims administration for payment bond claims. Further, it is nearly impossible for a contractor to be able to have sufficient liquidity

to post these types of instruments without affecting his ability to carry out normal business.

#### 7. Legislative Approaches Generally

AIA believes that legislation is necessary to allow sureties to have some certainty as to their liability on bonds for Superfund cleanup projects. Without this certainty there will continue to be a limited number of sureties willing to take such a risk for a limited number of contractors. Legislation is necessary to ensure that the surety has the same standard of negligence as its contractor, that the surety is entitled to indemnification to the same extent as its contractor, that the guarantee of the performance bond is limited to the cost of completion of the work in accordance with the plans and specifications, up to the penal sum of the bond, less remaining contract balances, that only the obligee on the bond can make claim on the performance bond, and that no claims shall accrue or be brought after a time certain, preferably one year from the date of substantial completion of the contract.

#### 8. CERCLA Contractor Applications

It is important that a surety be provided with the same liability standard and indemnification opportunities as its RAC. As discussed above, if a surety performs its obligations under its bonds, it may be construed to have arranged for the cleanup of the site. Under Section 107 of CERCLA, this could subject the surety to a standard of strict liability. However, the surety is not the polluter and did not contribute to the problems caused by the site. Rather, the surety merely is arranging for the completion of the contract entered into by the RAC.

Under normal laws of suretyship a surety's liability is coextensive with that of its principal. It is only through the language of 107 that this would not be true in the Superfund cleanup context. The negligence standard applicable to the RAC must apply to the surety for the RAC. Similarly, if the RAC is entitled to be indemnified for claims brought due to its negligence, so should the surety who is performing its obligations under the bond issued in conjunction with the response action contract. The surety is not asserting that it should be indemnified for costs arising out of the performance of its obligations under the bonds, but for third party claims made against it. This indemnification available to the RAC must also be available to the surety.

#### 9. Rights of Action

A statutory clarification that only the obligee can bring claim on the performance bond is necessary to bring certainty into the arena. While case law is fairly consistent that only the obligee has a right to bring suit on a performance bond, as always, there are aberrations. There have been instances when a payment bond was not issued where the laborers were allowed to sue under the performance bond as third party beneficiaries of the performance bond. It is not the intent of a surety on a

performance bond to benefit anyone other than the obligee, the party who contacts for performance. In the instance of a HTW cleanup project the obligee would be the governmental body contracting with the RAC. The surety is willing to be subject to claims by the obligee on its bond, but it cannot take the chance that a court may construe the bond to provide protection to some third party under a third party beneficiary theory.

#### 10. Statute of Limitations

Some termination date for a surety bond issued on HTW cleanup projects is essential. The current statute of limitations applicable to Miller Act performance bonds is the general federal statute of limitations for contracts, 28 U.S.C. sections 2415-16. This provides a period of six years from the time the cause of action accrues. The uncertainty of when the cause of action accrues is compounded on a HTW cleanup site due to the types of claims which might be made. Damages could take years to come to the attention of the government if they do not have some special incentive to be diligent in their supervision and acceptance of the work.

On a normal construction project a surety anticipates that claims under the performance bond will be made either during the work or shortly after the completion and acceptance of the work by the owner. If the work is improperly performed under a normal construction project it will be fairly evident. This is not necessarily so for HTW cleanup projects. It is essential that the surety be able to determine with certainty when its liability on the bond will terminate.

The Corps Study discusses this in two separate places. In discussing options the Corps states, "Minimize the time period of surety performance and thereby reduce the time exposure for surety coverage." In discussing clarifying surety liability the Corps states, "The government will define the point at which bond completion requirements have been fulfilled." 12/ While the Corps believes this can be done administratively, for the reasons discussed earlier the sureties feel statutory language is necessary. Precedent for this legislation was discussed earlier in this testimony.

The most important thing to the surety is certainty. A statutory provision which provides this, while allowing the surety to agree to a greater liability probably provide the comfort the sureties are seeking.

#### 12. Bond Conditions

Due to the uncertain nature of the work being performed, sureties feel that it is necessary to have a legislative description of what the performance bond guarantees. What the sureties seem to be capable of guaranteeing is the cost of completion of the contract in accordance with the plans and specifications, up to the amount of the bond. In other words, sureties are able to guarantee that the owner will either receive

the completed project, or receive the money to complete construction of the project in accordance with the plans and specifications. This is what the government needs guaranteed, and this is what the surety can provide. It is necessary to state this in legislation so that a court will not construe the performance bond on a HTW cleanup site to guarantee every agreement the RAC may have made with the owner aside from completion of the work in accordance with the plans and specifications.

13. Application of State-Federal Bonding Laws

Under the Miller Act surety bonds are required for "any contract, ... for the construction, alteration, or repair of any public building or public work of the United States..."<sup>13/</sup> "Contracts means contracts between the United States and prime contractors."<sup>14/</sup> Even though the work benefits private property, if the contract is between the United States and a prime contractor the Miller Act applies. <sup>15/</sup> State law would apply if the project were contracted for by a state entity rather than an agency of the federal government. The amount of money contributed to the project does not affect who is the governing entity, and thus which law applies. The contracting party, who also is the procuring party, determines the applicable law.

If the Miller Act applies, then claims under the bond constitute a federal cause of action.<sup>16/</sup> Recent decisions make it clear that this does not preempt claims under state law for causes which arise other than on the bond. For example, the surety has been held liable under state unfair claims practices statutes, even on Miller Act bonds.<sup>17/</sup>

14. State Specific Assessment

Many states are experiencing the same bond unavailability for these types of projects as is the federal government. None of the provisions discussed in this testimony would preempt state law. Therefore, none of these provisions would assist the states in resolving this matter on state lead projects.

15. General State Comparison

To the extent the provisions discussed in this testimony conform or depart from existing law, we have attempted to address that in the section discussing that provision. If the Subcommittee would like additional information on this subject we will be happy to research the issue further and submit supplemental testimony.

Again, AIA would like to thank the Subcommittee for allowing us to testify today. Further, we would like to commend the Subcommittee for holding this hearing on such a critical problem in the Superfund program. While this crisis still is in its early stages, the Subcommittee has the opportunity to prevent the Superfund program from coming to a halt due to inadequate competition, increased costs of construction and delays, all caused by the difficulty sureties have in participating in this market. Legislation is necessary to resolve this matter. We hope that we have been of assistance to the Subcommittee.



## ENDNOTES

- 1/ U.S. Army Corps of Engineers, Hazardous and Toxic Waste (HTW) Contracting Problems: A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program (July 1990)
- 2/ 54 Federal Register 46015.
- 3/ U.S. EPA, Task Force on the Indemnification of Response Action Contractors (undated) at 1.
- 4/ Report of the House Committee on Judiciary, H.R. Rep. No. 99-253 (III), 99th Congress, 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News, 3038, 3050 [hereinafter Judiciary Report].
- 5/ Report of the House Committee on Energy and Commerce, H.R. Rep. No. 99-253 (I), 99th Cong., 2d Sess., 92 reprinted in 1986 U.S. Code Cong. & Admin. News, 2835, 2874.
- 6/ Judiciary Report, supra note 3, at 3050.
- 7/ Upjohn Co. v. New Hampshire Insurance Co., 178 Mich. App. 706, 444 N.W. 2d 813 (Mich. Ct. App. 1989)
- 8/ Hartford Fire Insurance Company v. Riefolo Construction Co., 161 N.J. Super 99, 390 A. 2d 1210 (1978)
- 9/ U.S. Army Corps of Engineers, Hazardous and Toxic Waste (HTW) Contracting Problems: A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program (July 1990), page 18
- 10/ U.S. Army Corps of Engineers, Hazardous and Toxic Waste (HTW) Contracting Problems: A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program (July 1990), page 5
- 11/ FAC 84-12 January 20, 1986. Part 28. Bonds and Insurance - Subpart 28.203-1 and 28.203-2.
- 12/ U.S. Army Corps of Engineers, Hazardous and Toxic Waste (HTW) Contracting Problems: A Study of the Contracting Problems Related to Surety Bonding in the HTW Cleanup Program (July 1990), pages 52 and 55
- 13/ 40 U.S.C. 270a-270d
- 14/ U.S. for the Use of Miller v. Mattingly Bridge Co., 344 F. Supp. 459 (W.D. KY 1972)
- 15/ Peterson v. U.S. for the Use of Marsh Lumber Co., 119 F.2d 145 (C.C.A. Ohio 1941)
- 16/ F.D. Rich Co. v. U.S. for the Use of Industrial Lumber Co., 94 S.Ct. 2157, 417 U.S. 116, 40 L.Ed. 2d 703 (1974)
- 17/ Alvarez v. Insurance Co. of North America, 667 F. Supp. 689 (M.D. Cal. 1987)



SIERRA  
CLUB



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Testimony of A. Blakeman Early  
of Sierra Club

Before the

Subcommittee on Superfund, Ocean and Water Protection  
United States Senate

September 19, 1990

"When we try to pick out anything by itself, we find it hitched to everything else in the universe." — *John Muir*  
National Headquarters: 709 Park Street, San Francisco, California 94107 (415) 776-2211

My name is A. Blakeman Early. I am Washington Director of the Pollution and Toxics Program of the Sierra Club. I appreciate the opportunity to testify before the Subcommittee, today.

As we all know, the Superfund program is moving much too slowly for a wide variety of reasons too long to go into today. It is safe to say that everyone wants to see this program move more quickly and effectively to clean up the many toxic waste and contamination problems nation-wide. In general, the Sierra Club takes the position that many of the problems that keep the program from moving more rapidly are solvable administratively and Congress should not revise the underlying law. We believe that legislative revisions in general could serve to slow down the program, rather than speed it up. Indeed, the Sierra Club would oppose any current legislative proposal which does not meet two criteria; it must be modest in terms of the change it makes to existing law, and it must be non-controversial. The Sierra Club will vigorously oppose any effort to significantly change the current law, particularly as it applies to potentially responsible parties at Superfund sites.

The subject of this hearing does provide an example of a problem that will impact the pace of the cleanup program which could be addressed with a minor legislative change that Congress should and can make. We agree that the lack of available surety bonds to guarantee cleanup contractor performance is a real problem. Performance guarantee bonds provide a valuable function in

the Superfund cleanup program. They help ensure cleanups are completed and, equally as important, completed in accordance with the plans and specifications of the cleanup contract. If insurance companies continue to refrain from writing surety bonds for cleanup contractors, we believe two results are likely. First, only a very limited number of cleanup contractors will be able to participate in the program, ensuring that only a limited number of cleanups can occur simultaneously. Second, with few contractors able to bid on cleanup contracts, the reduced competition will drive up the cost of bids and therefore, the cost of the entire cleanup program. Neither of these results are good for the program.

The Sierra Club support three changes to section 119 of CERCLA which would make it more attractive for members of the insurance industry to issue surety bonds to guarantee cleanup contract performance.

#### Restrict Liability for Sureties

The industry asserts that section 119 is not clear that a surety which takes an action pursuant to the requirement of a bond has the same liability as the response action contractor would have had. Since the surety is essentially taking the place of the response action contractor we see no reason why the law should not clearly provide that they acquire the same liability standard and also qualify for indemnification as such a contractor would.

#### Total Limit to Surety Liability

Second, the industry also asserts it needs to limit the liability of a surety to the amount of the contract less any amount which EPA has not paid on the cleanup contract. While such a limit makes sense in the context of a surety simply completing a cleanup which for some reason has been interrupted and abandoned by the original contractor, such a limit may not be sufficient in cases where the contractor performs the cleanup improperly and the cleanup must be re-done. It is conceivable that the cost of fixing an improperly performed cleanup could actually exceed the amount of the original contract. I believe that EPA must retain the ability to protect itself against that type of occurrence either through the surety bond or perhaps some supplementary form of insurance. If the industry is simply taking the position that sureties should not be liable for fixing a botched cleanup unless they specifically agreed to should such liability as part of the original contract, I believe such a position is fair. I am not familiar with the Miller Act, but it may be that provisions therein may have some bearing on this issue. I urge the Subcommittee to examine how EPA can best insure against an inadequately performed cleanup.

#### Limit Rights of Action

Insurance industry representatives are also concerned the law does not clearly provide that only the EPA can sue to invoke the provisions of surety bond against the surety. They apparently concerned about potential lawsuits from victims or citizens who may actually be attempting to raise or litigate

other issues of liability. The Sierra Club will support the limitation of the rights of action, but recommend that the government be allowed to provide for the right of action for others in the bond, as appropriate. For instance, in the case where a state is responsible for maintaining a site after an EPA sponsored cleanup, it may be desirable to provide that the state could invoke the bond if it found a problem caused by improper contractor performance and the contractor was unavailable to rectify the situation. As you know, under CERCLA, states bear the major burden for long-term monitoring and maintenance of sites that have been cleaned up.

#### Statute of Limitations

Finally, the insurance industry seeks a statute of limitations for bringing a suit on a performance bond that would begin to run one year from the earlier of the date of substantial completion of the contract or the date rights of the contractor to perform under the contract are terminated. The Sierra Club can not support this proposal. Normally, a statute of limitations for a performance bond on a construction project would begin to run from the date a breach of performance is discovered or should reasonably have been known to have occurred. We see no reason why a performance bond for a cleanup contract should be any different. From a public policy point of view, it is important to maximize the incentives that cleanup contractors receive to perform cleanup in accordance with the terms and specifications of the contract. Secondly, it is important that if a contract is not performed properly, that the problem be rectified as easily and quickly as possible. By providing that the statute of limitations runs from the so-called "date of discovery", both the contractor and the surety know that there is a greater

likelihood that an inadequately performed contract will be discovered and they will be held accountable. Thus both the contractor and the surety will be more likely to make sure the job is done right to begin with. The proposal by the insurance industry provides only a very small window of potential liability for improper performance and therefore lessens the incentive to care whether the job is well performed. While Superfund cleanups may be characterized as involving exotic and experimental new construction techniques, in fact, much of the work is no different from standard construction. As you know, all too often EPA opts for a cleanup which involves little more than building structures to contain the waste. This is not an inherently complicated construction activity.

We look forward to working with members of the Subcommittee to address this surety bonding problem. As I mentioned before, it is imperative that this problem be addressed in a manner that does not open up CERCLA to other amendments which have been proposed which are very controversial and could be damaging to the Superfund program. If this means that Congress can not address the surety bond problem, then Sierra Club would support the decision by the members of this Subcommittee not to legislate on this matter.



## AMERICAN INTERNATIONAL GROUP, INC.

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October 10, 1990

The Honorable Frank R. Lautenberg  
United States Senate  
SH-717 Hart Senate Office Building  
Washington, DC 20510-3002

Dear Senator Lautenberg:

American International Group, Inc. is a leading U.S. international insurance and financial service organization and the largest underwriter of commercial insurance in the United States. With more than 30,000 employees and assets exceeding \$50 billion, its member companies write property, casualty, surety, marine, life and financial services insurance throughout the country and the world.

AIG is a leader in providing coverage for environmental risks, having entered the market in the late 1970's with an Environmental Impairment Liability insurance program.

AIG is a major force in the surety industry and, in line with its other environmental coverages, wishes to be able to provide suretyship to those environmental remediation and pollution control contractors which meet our underwriting criteria.

Our review of the recently proposed amendment to Section 119 of CERCLA prompts us to make certain observations and comments. The amendment's provision to allow a Superfund surety the same CERCLA protections enjoyed by its Contractor/Principal is appreciated. Further, the clarification of right of action and exclusion of tort liability is also potentially helpful.

We have serious concerns, however, about the limited application of this needed clarification to "direct Federal procurement." This provision is also needed with respect to surety bonds provided on behalf of contractors performing remedial actions for potentially responsible parties (PRPs) under consent decrees and for "state-lead" CERCLA actions. Our concerns are twofold:

First, by making these clarifications only with regard to federally procured response action contracts (RACs), the amendment may provide the foundation for the argument many years in the future, that the law for interpreting surety bonds arising out of private party RACs is different than that for federally procured RACs because the Congress made this clarification for only those response action contracts procured by the federal government.

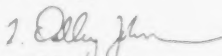
If we must worry that, in years to come, the function and scope of surety bonds issued for private party RACs will be misinterpreted as we have seen happen with third party liability policies written long ago, then these surety bonds will not be written; or will be written with such extraordinary underwriting conditions as to severely limit the number of contractors pre-qualified to perform remedial actions.

Secondly, the ability to serve an adequate number of contractors and to write bonds in sufficient volume is a prerequisite to achieving the spread of risk upon which insurance and surety credit are based. Further, simple economic principles demand that enough business be generated to justify the commitment of human and financial resources that would be required to provide surety bonds for response action contracts.

While we understand that the Environment and Public Works Committee is focusing on the immediate impact of the Miller Act requirement that surety bonds be obtained for Federal procurement of RACs, we ask the Committee to recognize that the concerns regarding suretyship for Federally procured RACs are the same concerns facing sureties of private party contracts. Just as CERCLA/SARA defines PRPs and RACs, and their responsibilities, rights and duties with regard to any and all NPL sites, so too should the status of a surety be defined with regard to potential liabilities arising from CERCLA and NPL remediation contracts, regardless of the legal identity of the Contract Administrator/Obligee.

In conclusion, we would like to thank you for providing an opportunity to comment on this important issue, and we look forward to working with you in the future.

Sincerely,

  
L. Oakley Johnson



Richard L. Forman, Executive Director

STATEMENT OF  
ASSOCIATED GENERAL CONTRACTORS OF  
NEW JERSEY

INDEMNIFICATION OF CONTRACTORS  
BIDDING SUPERFUND CONTRACTS

UNITED STATES SENATE  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

SEPTEMBER 19, 1990



Mail: 7 Centre Drive, Suite 8, Jamesburg, NJ 08831, (609) 655-2997

-2-

THE AGC OF NEW JERSEY IS THE HEAVY HIGHWAY CHAPTER OF AGC OF AMERICA IN NEW JERSEY. WE HAVE CLOSE TO 100 CONTRACTOR MEMBERS ENGAGED IN A WIDE VARIETY OF HEAVY/HIGHWAY WORK, INCLUDING SITE CLEARANCE.

IT IS IRONIC THAT WHILE TRADITIONAL HEAVY/HIGHWAY CONSTRUCTION WORK HAS BEEN LANGUISHING IN NEW JERSEY BECAUSE OF A DEPRESSED ECONOMY, THE STATE HAS A VAST UNTAPPED CONSTRUCTION MARKET WITH THE LARGEST NUMBER OF SUPERFUND SITES IN THE COUNTRY. AT LAST COUNT THERE WERE 110 HAZARDOUS WASTE SITES ON THE SUPERFUND LIST. YET, OUR MEMBERS HAVE BEEN UNABLE TO TAKE ADVANTAGE OF THIS FACT BECAUSE OF INADEQUATE INDEMNIFICATION BY THE EPA.

ABOUT 10 MONTHS AGO THE CHAPTER MAILED A QUESTIONNAIRE TO ITS CONTRACTOR MEMBERS DEALING WITH FEDERAL AND STATE HAZARDOUS WASTE CLEAN UP PROJECTS. WE POINTED OUT THAT PRIME CONTRACTORS ON MOST OF THESE PROJECTS TURN OUT TO BE OUT OF STATE NON-UNION COMPANIES, AND WHERE MEMBERS ARE SUCCESSFUL IN OBTAINING ADEQUATE INSURANCE TO BID AS SUB-CONTRACTORS, THEY ARE FACED WITH UNION JOB ACTIONS WHEN THEY BEGIN THEIR WORK.

WE RECEIVED A 20 PER CENT RESPONSE RATION TO OUR QUESTIONNAIRE, CONSIDERED HIGH GIVEN THE SHORT RESPONSE PERIOD THAT WAS ALLOTTED. ONLY SIX MEMBERS INDICATED THEY WERE CURRENTLY BIDDING THIS TYPE OF WORK, AND ONLY TWO OF THEM AS PRIME CONTRACTORS. FOUR INDICATED THEY WERE NOT INTERESTED IN BIDDING THIS TYPE OF WORK, AND THE GREAT MAJORITY - 13 - REPLIED THEY WERE NOT BIDDING BUT WOULD BE INTERESTED IF THE REQUIRED INSURANCE AND BONDING WERE READILY AVAILABLE.

MOST RESPONDENTS COMMENTED THAT THE OWNER SHOULD CARRY ALL LIABILITY FOR HAZARDOUS WASTE CLAIMS, NOT THE CONTRACTOR, WHO IS MERELY PROCESSING OR HAULING IT.

THE CONTRACTORS WHO STATED THEY WERE NOT INTERESTED IN THIS TYPE OF WORK SAID IT CARRIES TOO MANY LONG TERM RISKS.

THE PRESENT SYSTEM WORKS AGAINST THE SMALLER CONTRACTOR SINCE THE AMOUNT OF INDEMNIFICATION A BIDDER REQUESTS FROM THE EPA IS INCLUDED IN ITS BID; THE LARGER THE CONTRACTOR, THE MORE INSURANCE HE CAN AFFORD ON HIS OWN. THE FORMULA MUST BE CHANGED TO MAKE IT MORE EQUITABLE FOR THE MID-SIZED AND SMALLER CONTRACTORS TO ENTER THE MARKET.

MOST INSURANCE AND BONDING COMPANIES WILL NOT INSURE CONTRACTORS FOR THIS WORK UNLESS THE CONTRACTOR HAS A

SEPARATE COMPANY SET UP TO DO THIS TYPE OF WORK EXCLUSIVELY. IN THAT WAY, THE INSURER CAN GO AFTER THE ORIGINAL COMPANY SHOULD THE NEW COMPANY FAIL.

ANOTHER DISTURBING TREND IS THAT MOST SUPERFUND CONTRACTS LET SO FAR HAVE BEEN AWARDED TO ENGINEER/CONSULTANT FIRMS, AND BY THEM, TO CONTRACTORS. WE AGREE WITH NATIONAL AGC THAT SUBCONTRACTORS (CONSTRUCTION CONTRACTORS) BE INDEMNIFIED DIRECTLY BY THE EPA.

WE URGE THE COMMITTEE TO PRESSURE THE EPA TO CHANGE SECTION 119 OF CERCLA TO CONFORM WITH THE RECOMMENDATIONS OF AGC/AMERICA - INDEMNIFICATION FOR 30 YEARS AT A TOTAL OF \$200 MILLION. TEN YEARS AND \$50 MILLION ARE TOO FAR INADEQUATE TO OPEN UP THIS VAST MARKET TO MID AND SMALL SIZED COMPANIES. BY DOING SO IT WILL REALIZE SAVINGS THROUGH GREATER COMPETITION.

TO UNDERScore THE COMPETITION ASPECT, LET ME CITE JUST TWO EXAMPLES:

THERE WERE JUST THREE BIDDERS FOR THE MOYER LANDFILL SUPERFUND SITE IN MONTGOMERY COUNTY, PENNSYLVANIA, LAST YEAR. THE LOW BIDDER, CHEMICAL WASTE MANAGEMENT, CAME IN AT \$28,526,565, OR APPROXIMATELY \$12 MILLION OVER THE GOVERNMENT ESTIMATE.

IN ANOTHER INSTANCE THE LOWEST OF THREE BIDS ON THE KRAMER LANDFILL TOXIC WASTE CLEAN UP PROJECT IN SOUTH JERSEY WAS \$55,677,099, OR A FULL \$20 MILLION OVER THE GOVERNMENT ESTIMATE!

GENTLEMEN, IT IS OBVIOUS THAT MAJOR CHANGES ARE NEEDED AND SOON, TO HELP THE NEW JERSEYS ECONOMY. WE URGE YOUR IMMEDIATE ASSISTANCE IN ORDERING THESE CHANGES NOW.

THANK YOU.



## NATIONAL CONSTRUCTORS ASSOCIATION

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1730 M Street NW, Suite 900, Washington, DC 20036-4571 (202) 466-8880

STATEMENT FOR THE RECORD

BEFORE

THE

SUBCOMMITTEE ON SUPERFUND, OCEAN AND WATER PROTECTION

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

CONCERNING

PROBLEMS OF SURETY BONDING IN THE SUPERFUND PROGRAM

SEPTEMBER 19, 1990



The National Constructors Association (NCA) represents some of the nation's foremost firms engaged in the design and construction of major industrial, commercial and process facilities worldwide. Five of the six largest U.S. contractors from Engineering News-Record's (ENR) top 400 contractors are NCA members as are 11 of the 26 contractors that grossed in excess of \$1 billion in 1988. NCA member companies collectively grossed in excess of \$50 billion in 1988 and employed more than 120,000 persons. Their projects utilized more than 75 million man-hours of labor in 1988 alone. NCA's member companies all utilize union labor. Attached to this testimony is a list of the NCA member companies.

Companies such as those represented by NCA are needed for the successful execution of the Superfund program. These large construction companies have extensive experience in managing and constructing large, complex projects -- just the type of project that many Superfund cleanups will be. As the pace of site remediation activities under the Superfund program accelerates, more and more of the companies that can do work at this level must be brought into the program for it to succeed.

It is important that we point out from the outset that many NCA member companies have not bid hazardous waste remediation work because of concerns regarding potential liability exposure. While a small number of NCA member companies are performing a limited amount of hazardous waste remediation work, these firms are doing so only on a conservative and selective basis. These firms perform detailed pre-bid risk assessments to review available liability protection and to eliminate high risk sites from bidding consideration.

Over the course of the past year, however, these carefully reviewed pre-bid risk assessments have been rendered unnecessary by the absence of surety bonds for these projects.

NCA member companies have found it increasingly difficult and now impossible to secure surety bonds for Superfund remediation contracts. Sureties with whom they have done business for decades have told them that bonding will not be made available for hazardous waste remediation work. In addition, some sureties have expressed concern about providing bonds for traditional construction work for its clients which continue to pursue hazardous waste remediation work. The sureties cite their concern that a client subjected to multi-million dollar liability for a hazardous waste project might default on the conventional construction work for which the surety has provided a bond.

As a result, NCA member companies face great uncertainty regarding their future ability to participate in the hazardous waste cleanup market. Their relationship with their sureties, traditionally a long, close and confidential relationship, has been disrupted. They do not know when or if bonding will be available to allow their participation in this market.

Over the past year EPA and Army Corps officials have been reluctant to acknowledge that there has been any lack of contractors to compete for Superfund contracts. Only the July, 1990 Army Corps study entitled "Hazardous and Toxic Waste (HTW) Contractor Problems" finally acknowledges the existence of a diminishing supply of Superfund contractors.

The study recommends the use of administrative as well as legislative remedies to address the concerns of surety bond companies and encourage their return to the market. The report acknowledges that the diminished supply of potential contractors gives rise to concerns about contracting delays and excessive increases in the cost of cleanup.

NCA and other contractor organizations expressed concern regarding the availability of surety bonds for this work in comments proposed in response to "EPA's Proposed Guidelines on RAC Indemnification" published October 31, 1989. In its comments submitted on February 20, 1990, NCA specifically noted the concern of performance bond sureties and suggested the following ways to address the problem:

The guidelines should make it clear that the EPA's indemnification of the RAC will extend to the surety to the extent that the RAC's surety suffers the imposition of third party or other liability ordinarily covered by the RAC's indemnification as a result of the completion of a cleanup contract under its performance bond.

Additionally, the guidelines should make it clear that the definition of Response Action Contractor does not include a performance bond surety nor does the definition of a Response Action Contract include the performance bond itself. In order to ensure that bonding is available on hazardous waste cleanup projects, it is necessary to satisfy the surety industry that its responsibilities are limited to providing to the owner the means to complete the bonded contract and that under no circumstances will the performance bond surety be exposed as a liability insurer to a government agency, the owner or third parties.

Those recommendations were made in the context of the proposed guidelines and at a time when bonding was still available, albeit on a limited basis.

Now, based on the best information we have been able to gather from our member companies and insurance/surety bond industry sources:

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<sup>1/</sup> National Constructors Association's "Comments on EPA's Proposed Guidelines on RAC Indemnification" (February 20, 1990)

- 1) Performance bonds are no longer available for Superfund cleanup contracts.
- 2) The lack of these bonds has or will prevent NCA companies from bidding for Superfund cleanup contracts.
- 3) Only a combination of administrative and legislative remedies is likely to bring surety bond companies back into the market in a manner which will allow the typical NCA company to participate.

NCA supports the elements of a solution which have been proposed by American Insurance Association representatives including:

- A) Extending the protections provided in Superfund Amendments and Reauthorization Act of 1989 (SARA) for the RAC to its surety;
- B) Requiring that bonds required under federal law be issued in accordance with the Miller Act (40 USC, Sections 270a - f);
- C) Limiting bond liability to actions brought by the named obligee; and
- D) Providing a reasonable limitation on the period of time during which an action may be brought against the bond.

We support these provisions because we believe they are necessary to address the legitimate liability concerns of the performance bond sureties and encourage their return to the market. NCA has discussed proposed legislative language with American Insurance Association (AIA) officials representing the sureties in

this matter and has worked with them to attempt to craft a legislative remedy which does only what is absolutely necessary to address those liability concerns.

In Michael K. Yates' remarks on behalf of NCA during the EPA hearing on February 20, 1990, he noted that:

As illustrated by the bid process for the Sikes Pit cleanup in Texas, bonding companies are becoming reluctant to participate in this process. We believe that there are two basic reasons for this reluctance. First, a concern that the lack of adequate insurance or indemnification for their principals will cause future litigants to attempt to convert the bond into a liability policy. Second, the lack of adequate insurance or indemnification for one major hazardous waste loss could well ruin the financial integrity of a company, thereby jeopardizing its ability to complete on-going work on other more traditional public works projects -- in which event, all of the Company's bonds would be subject to claim.<sup>2/</sup>

NCA understands and appreciates the liability concerns of the surety because many of its members remain concerned about the liability protection/indemnification which may be available to the Response Action Contractor (RAC). Until EPA finalizes its Proposed Guidelines for the Indemnification of RAC's, the future liability protections are uncertain, at best, and further legislative action may be necessary to rectify the problem. Nevertheless, the current liability scheme for RAC's still allows NCA's members to participate in the Superfund cleanup program in the selective manner previously described.

<sup>2/</sup> Michael K. Yates, Ph.D., Statement on behalf of the National Constructors Association to the Environmental Protection Agency at the Hearing on the EPA's Proposed Final Guidelines (February 20, 1990)

Without surety bonds, however, NCA's members cannot even bid on Superfund projects. The surety bond problem is, therefore, an urgent matter for the NCA membership, particularly for existing and potential Superfund contractors. Without its resolution, NCA's member companies are shut out of the market for an as yet undetermined period of time.

NCA thinks that both the construction of the law and common sense dictate that legislation must be enacted to resolve this matter. First, NCA knows of no effective way to administratively remedy the sureties' concerns regarding potential liability arising from statutory language. Second, even if there was such a mechanism, there is no way to determine whether such changes could be implemented in a timely manner. The regulatory process is by its nature a long and arduous one.

Delays, in this case, work against the Superfund program and against the contractors which want to be a part of it. A legislative remedy this year will allow the Superfund contracting process to move forward without the delays and potential cost increases which would be the natural outcome of having fewer and fewer contractors able to get bonds and bid.

NCA's members stand ready to work with the Corps, EPA, Congress, the surety industry and other contractor organizations in support of a mechanism for improving the availability of surety bonds and increasing competition for Superfund cleanup projects.

NCA encourages this Subcommittee to set in motion a legislative remedy which will address the sureties' concerns and allow NCA's membership to participate once again in the Superfund cleanup program.



APPENDIX

Asea Brown Boveri (Combustion Engineering Inc.)  
The Austin Company  
Badger America, Inc.  
Bechtel Construction Company  
Oscar J. Boldt Construction Company  
Ebasco Constructors, Inc.  
Fluor Constructors International, Inc.  
Kiewit Industrial Co.  
Leonard Construction Company  
Lummus Construction Company  
Parsons Constructors Inc.  
The Rust Engineering Company  
Stone & Webster Engineering Corporation  
Tompkins-Backwith, Inc.  
UE&C-Catalytic, Inc.  
Wright Schuchart Harbor Co.

Affiliate member:  
University Mechanical National Constructors Inc.

October 11, 1990

The Honorable Frank R. Lautenberg  
Chairman  
Subcommittee on Superfund, Ocean and  
Water Protection  
Committee on Environment and Public Works  
458 Senate Dirksen Office Building  
Washington, D. C. 20510

Dear Mr. Chairman:

We are writing in support of legislation currently pending in the Senate which would clarify the liability of companies which write surety bonds for Superfund site remediations. This legislation was favorably reported by the Senate Environment and Public Works Committee on October 4. We expect the bill, which at this writing has no number, to be on the Senate calendar within a few days.

We urge passage of this legislation, which addresses the sureties' concerns with regard to the imposition of liability associated with the bonding of Superfund remediation projects far beyond the surety's bond guarantees to complete performance and pay subcontractors and suppliers. The legislation pending in the Senate would address these concerns by providing that the surety would have the same protections as its contractor, if the surety begins activities to meet its obligations. The provisions also clarify that the surety will have only its traditional responsibility to complete the project and see that all of the contractor's bills are paid.

The unavailability of bonding, required for Federal construction contracts under the Miller Act, stems from the potential liability and uncertainty surrounding such liability that may accrue to sureties from interpretation of Federal statute (CERCLA and SARA).

The unavailability of bonding precludes all but two companies from bidding on major Superfund remediation projects. This comes at a time when the Environmental Protection Agency faces 200 Congressionally mandated Superfund new construction starts by October 1991, with 149 sites now ready for remedial action.

Along with delay, the absence of competition carries a direct financial cost to the Superfund. This potential was illustrated in a recent major procurement, when only one bidder was able to secure a bond, driving the initial bid to \$138 million, \$48 million over the government's \$89.9 million estimate.

Limiting the pool of highly qualified contractors working on Superfund sites will also affect the quality of Superfund cleanups. This will be especially evident on large, technically complex remediation sites where highly qualified, well capitalized companies with the technical and management capabilities to complete the project while protecting the health of the surrounding communities are unable to obtain bonds and are virtually shut out of the procurement process.

The bill as reported out of Committee is designed to trigger significant surety participation in the cleanup program. We support it because it is critical that these problems be addressed so that competition can be brought into the Superfund procurement process enabling the actual site cleanup phase of the program to move forward in earnest.

Robert J. Blackwell  
EBASCO SERVICES INCORPORATED

Robert E. Vagley  
THE AMERICAN INSURANCE  
ASSOCIATION

Robert P. McCormick  
NATIONAL CONSTRUCTORS ASSOCIATION

Susan Loomis  
ASSOCIATED GENERAL CONTRACTORS  
OF AMERICA

David L. Mallino  
Connerton, Ray & Simon  
representing THE LABORERS  
INTERNATIONAL UNION OF NORTH  
AMERICA

Lloyd Provost  
THE SURETY ASSOCIATION OF  
AMERICA

A. Blakeman Early  
THE SIERRA CLUB

John J. Curtin, Jr.  
THE NATIONAL ASSOCIATION OF  
SURETY BOND PRODUCERS

William J. Roberts  
THE ENVIRONMENTAL DEFENSE FUND

SS/lf